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PATNA SECTION

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1946

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J. Nar
Advocate High Court
Jammu & Kashmir
Srinagar.

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AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
298	27 P L T	93		326	12 B R	656		376 con	47 Cr L J	691		398 con	27 P L T	107	
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AIR 1946 Patna				AIR 1946 Patna				AIR 1946 Patna				AIR 1946 Patna			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	24 Pat	781		50 con	12 B R	651		101 con	47 Cr L J	817		133	11 Cut L T	56	
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185	12	B R	260	285	12	B R	723	365	12	B R	361	417	12	B R	488
	222	I C	378		226	I C	316		223	I C	251		224	I C	160
	27	P L T	217		47	Cr L J	892		25	Pat	145	418	12	Cut L T	17
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	226	I C	125		13	B R	54	SB	225	I C	147		228	I C	388
190	12	B R	288		227	I C	413		25	Pat	468		48	Cr L J	240
	222	I C	617	295	12	B R	330		27	P L T	313	419	12	B R	513
191	12	B R	314	SB	223	I C	162	371	25	Pat	95		224	I C	312
	223	I C	85		1946-14	ITR	775		27	P L T	205	423	13	B R	220
	47	Cr L J	339	297	25	Pat	156		12	B R	759		228	I C	468
196	24	Pat	699	SB	27	P L T	228		226	I C	399	426	25	Pat	120
	12	Cut L T	1		226	I C	258	372	25	Pat	82		13	B R	217
	48	Cr L J	40		1946-14	ITR	292		12	B R	761		228	I C	262
	228	I C	59		12	B R	717		226	I C	463		48	Cr L J	227
	13	B R	125	298	12	B R	385		27	P L T	376	429	12	B R	383
199	12	B R	685		223	I C	297	373	25	Pat	33		223	I C	294
	226	I C	122		25	Pat	84		12	B R	751	430	13	B R	226
200	24	Pat	705	301	25	Pat	50		226	I C	404		228	I C	478
	227	I C	612		12	B R	698		47	Cr L J	937		27	P L T	402
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	12	B R	564	309	12	B R	359	384	12	B R	527		48	Cr L J	217
210	24	Pat	671		223	I C	240		224	I C	402	435	12	B R	336
	229	I C	557	310	25	Pat	90		47	Cr L J	614		223	I C	223
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214	24	Pat	741		227	I C	253		224	I C	331		224	I C	319
	227	I C	630	313	12	B R	446		27	P L T	445		27	P L T	267
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218	24	Pat	727		223	I C	336	392	12	B R	466		223	I C	131
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	25	Pat	1		47	Cr L J	328		224	I C	297		228	I C	482
235	24	Pat	708	336	12	B R	348	403	12	B R	535	447	12	B R	425
	13	B R	176		223	I C	236		224	I C	411		223	I C	553
	228	I C	282	338	25	Pat	103		27	P L T	138	459	12	B R	412
	48	Cr L J	182		226	I C	527	404	12	B R	457		223	I C	442
239	24	Pat	715		12	B R	777		224	I C	65	466	12	B R	420
	13	B R	171	347	12	B R	339		27	P L T	464		223	I C	457
	228	I C	274		223	I C	201	407	13	B R	18	467	12	Cut L T	5
	48	Cr L J	178	853	25	Pat	161		227	I C	225		228	I C	198
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251	24	Pat	744		12	B R	744	408	12	Cut L T	10	470	12	B R	344
	27	P L T	284		226	I C	391		13	B R	20		223	I C	232
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	222	I C	315	354	12	B R	736	412	25	Pat	153	471	12	Cut L T	19
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Other Journals = All India Reporter

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ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R		
1	1946	P	231	19	1946	P	330	50	1946	P	301	84	1946	P	298	98	1947	P	16
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ILR	A I R			ILR	A I R			B R	A I R			B R	A I R			B R	A I R			
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215	"	"	27	779	"	"	418	259	"	"	128	501	"	FC	13	702	"	"	110	
227	"	"	157	782	"	"	430	260	"	"	185	504	"	PC	48	708	"	PC	127	
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62	"	"	199
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74	1947	"	361
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83	"	"	283
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27 P L T

(Parts 1 to 37)

PLT	A I R		
1	1946	PC	1
5	1945	"	151
7	"	P	475
12	"	FC	67

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22	1946	P 272	107	1945	" 398	205	1946	" 371	298	"	" 90	402	1946	" 430			
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40	1947	" 78	138	"	" 403	213	"	P 353	313	"	P 369	408	1947	" 336			
46	1945	" 477	140	"	" 34	217	"	" 185	315	1947	" 281	414	"	" 412			
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[REDACTED]

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Advocate High Court
Jammu & Kashmir

THE *Srinagar*
ALL INDIA REPORTER
1946
Patna High Court

[Case No. 1.]

* **A. I. R. (33) 1946 Patna 1**
FULL BENCH

FAZL ALI C. J., AGARWALA,
MANOHAR LALL, SHEARER
AND SINHA JJ.

Mahadeo Prasad Jayaswal — Petitioner
v.

Emperor.

Criminal Revn. No. 869 of 1945, Decided on 11th October 1945, from order of Judicial Commissioner, Chota Nagpur, D/- 7th June 1945.

* (a) Defence of India Rules (1939), R. 119 (1) — Provision in, as to best manner of publication — Applicability of — Cotton Cloth and Yarn Control Order, 1943, published in Government of India Gazette — Mode of publication is sufficient: 1945 P. W. N. 374, **OVERRULED**.

Held by the Full Bench that the Cotton Cloth and Yarn Control Order, 1943, which was published in the Government of India Gazette was duly published according to the law so as to affect the persons concerned with notice of the order: 1945 P. W. N. 374, **OVERRULED**; *Case law discussed*. [P 9 C 2; P 10 C 1]

Per *Fazl Ali C. J., Shearer and Sinha JJ.* — The illustrations which are appended to S. 114, Evidence Act, are not exhaustive but merely illustrate the principle underlying the main provision. The presumption to be drawn under that section is one of fact and whether it should be drawn or not in a particular case must depend upon the facts of that case. [P 6 C 1]

It is a well-known practice of the Central and Provincial Governments to publish their Acts and Notifications in their Official Gazettes. Therefore when an order passed by the Central or the Provincial Government is published by it in the Official Gazette it may be presumed that the Government while publishing the Order was aware of the provisions of R. 119 (1) and the publication was made in compliance with all its provisions including the provision as to the determination of the most suitable form of publication. [P 6 C 1, 2]

Therefore when the Central Government published the Cotton Cloth and Yarn Control Order, 1946 P/1 & 2

1943, in the Government of India Gazette it cannot be said that though the Government was alive to the necessity of publication it did so without bearing in mind the provisions of R. 119. It must be presumed that the Government was aware of the provisions of R. 119 and the publication was made in full compliance with the provisions of R. 119 (1) including the provision for determining the most suitable form of publication. If there had been no publication at all the position might be different. It is not open to the civil Court to question the adequacy of the manner of publication. [P 4 C 2]

Per *Agarwala J.* — Under S. 2 (1), Defence of India Act, the Central Government has power to make by notification in the Official Gazette rules for maintaining supplies essential to the life of the community. Control of prices and rates of supplies through the Cotton Cloth and Yarn Control Order is essential to the life of the community in times of extreme emergency. As the order was published in the Government of India Gazette the publication is a sufficient compliance with the requirements of the law. The fact that the Order was made under R. 81 (2), Defence of India Rules, is immaterial because these Rules are merely framed to give effect to S. 2, Defence of India Act, and so far as the Central Government is concerned an Order which it has power to make under the Defence of India Rules is also within the power it has under S. 2, Defence of India Act, which merely requires publication in the Official Gazette. [P 9 C 2; P 10 C 1]

Per *Manohar Lall J.* — When an Order passed by the Central or Provincial Government is published by it in the Official Gazette no presumption can be drawn under S. 114, Evidence Act, that in the opinion of the Government such method of publication was best adapted for informing the persons concerned of the provisions of the Order. Under R. 119 (1) the Central or Provincial Government is required to form the opinion as to the best manner of publication of the Order made by it only in cases where it is going to adopt a manner of publication other than the normal manner in which its Acts and notifications are published in the Official Gazette. Moreover the Courts cannot question the manner however inadequate it may appear to them in which the authority decides that the notification should be published. Hence the publication of the Cotton Cloth and Yarn Con-

Control Order by the Central Government in Government of India Gazette is itself sufficient compliance with R. 119 (1). [P 10 C 2]

(b) Defence of India Rules (1939), R. 119 (1) — Order made by authority other than Central or Provincial Government or Order made by Central or Provincial Government published otherwise than in Official Gazette — R. 119 (1) must be strictly complied with (Per *Fazl Ali C. J., Manohar Lall, Shearer and Sinha JJ.*).

Per *Fazl Ali C. J., Manohar Lall, Shearer and Sinha JJ.* — Where an Order of a general nature under the Defence of India Rules is made by an authority or officer subordinate to the Central or Provincial Government who has not at his disposal any recognized machinery or medium for publishing and notifying the orders made by him and who has to select in each case his own method of promulgating them, it is necessary to inquire whether there was any publication at all of the Order and if so, whether the publication was made by the authority or officer in full compliance with the provisions of R. 119 (1) including the provision as to his determining the most suitable form of publication. In such cases R. 119 must be strictly complied with and the prosecution must establish that the authority making the Order did form an opinion that the particular manner of publication adopted by it was best adapted for informing persons concerned of the provisions of the Order. But if there is some evidence as to the publication of an Order, though the publication may be seemingly inadequate, and it is also proved that the accused had knowledge of the Order then the Courts will not, as a rule, insist on very strict proof of the other ingredient of the Rule, namely, that the authority or the officer making the Order had exercised his mind to determine that the Order was to be published in the manner best adapted for informing the persons concerned of its contents. [P 8 C 1]

Per *Manohar Lall J.* — When an Order made by the Central or Provincial Government is published in a manner other than its well-known practice of publication in the Official Gazette it must be established that the Government did form an opinion that the mode of publication adopted by it was best adapted for informing persons concerned of the contents of the Order. [P 10 C 2]

(c) Defence of India Rules (1939), R. 119 (1) — Manner of publication determined by authority making Order cannot be questioned (Per *Fazl Ali C. J., Manohar Lall, Shearer and Sinha JJ.*).

Per *Fazl Ali C. J., Manohar Lall, Shearer and Sinha JJ.* — Rule 119 (1) gives the authority making an Order of a general nature under the Defence of India Rules a discretion with regard to the manner in which the Order is to be published. It does not require the authority to state in writing that in its opinion the manner of publication decided upon by it was best adapted for informing persons concerned of the provisions of the Order. Hence once the authority has determined the manner of publication it is not open to the Court or any person to say that the manner of publication was inadequate or that R. 119 (1) was not complied with merely because the authority did not state in writing that the manner of publication was in its opinion best adapted for informing persons concerned of the provisions of the Order. If it is found that the authority has acted in an arbitrary or careless manner the onus must fall heavily on the prosecution to show that R. 119 (1) was intended to be and in fact complied with. [P 5 C 2]

Per *Shearer J.* — Rule 119 gives a wide discretion to every authority, making Orders of a general nature under the Defence of India Rules to decide in what manner they should be published. It is not for the Courts to ascertain in every single case exactly how this discretion has been exercised. It is only when the evidence relating to publication creates a suspicion that the discretion has been exercised in such a way as to amount in law to no exercise in good faith, of the discretion at all that the matter need or ought to be further investigated, if necessary, and, in the last resort by putting the person who made the Order into the witness-box. [P 15 C 1]

It is, therefore, not correct to say that once an authority, officer or person making an order has given directions as to the manner of its publication, these directions are to have precisely the same legal effect as a provision in an English statute requiring a local body or a railway company to publish its bye-laws : ('45) 32 A. I. R. 1945 Pat. 307, *Not approved.* [P 14 C 2]

(d) Defence of India Rules (1939), R. 119 (1) and (1A) — Word "authority" includes Central and Provincial Governments (Per *Fazl Ali C. J., Manohar Lall, Shearer and Sinha JJ.*).

The word "authority" in R. 119 (1) has been used in a wider sense so as to include the Central and the Provincial Governments also. [P 7 C 1]

(e) Defence of India Rules (1939), R. 119 (1) — Non-compliance with — Effect of (Per *Fazl Ali C. J., Shearer and Sinha JJ.*).

The reason for enacting R. 119 was that the person making Orders under the Defence of India Rules shall take steps to ensure that the Orders are promulgated in such a manner that they will reach the persons who will be affected by them. If R. 119 (1) is not complied with at all the consequences may be disastrous. If there is no publication whatsoever, it cannot be proved or said that the Order in question has become operative and that the accused had knowledge of the Order contravened. Therefore it will be going too far to say that non-compliance with R. 119 (1) will involve no legal consequences and will merely deprive the prosecution of a simple method of establishing that the person affected had notice of the order affecting him: ('44) 31 A.I.R. 1944 Bom. 259, *Dissent.* [P 7 C 2]

(f) Defence of India Rules (1939), R. 119 (1) — Publication of Order — Rule complied with — Accused must be deemed to have been informed of Order even though he was not in fact informed (Per *Manohar Lall J.*).

Even if the accused is able to prove that he never knew in fact of the passing of a particular Order of a general nature, he will not be entitled to an acquittal if the prosecution establish that the requirements of R. 119 (1) have been complied with, because the essence of the matter is that whether the accused knew or did not know of such an order, he shall be "deemed to know" as is provided by the Rule. [P 11 C 2]

The publication required by R. 119 results, in it being deemed that the person concerned has been duly informed, although in reality he has not been duly informed. Therefore the prosecution is relieved from the burden of proving that the accused has been in fact informed; he may not have been informed, but he shall be deemed to have been in-

formed if the requirements of the rule are complied with : ('30) 17 A.I.R. 1930 P. C. 54, *Rel. on.*

[P 11 C 2; P 12 C 1]

(g) Defence of India Rules (1939), R. 119 (1) — Word "thereupon" in — Meaning of — Words and phrases (Per *Agarwala J.*).

The word "thereupon" in R. 119 (1) means on publication of the Order in the manner required by the Rule. [P 8 C 2]

(h) Interpretation of statutes — Law settled by decisions altered by Legislature — Decisions cannot be inferred to have been wrong (Per *Manohar Lall J.*).

An alteration by the Legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion: ('34) 21 A.I.R. 1934 P. C. 45, *Rel. on.* [P 11 C 2]

(i) Defence of India Rules (1939), R. 119 (1) — Object of.

The words "in such manner as may in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns" in R. 119 (1) have been inserted in order to prevent its being contended, or in order to reduce the number of cases in which it might plausibly be contended, that what had been done in a particular case did not amount in law or in fact to publication. In the absence of some such words it might, for instance, have been argued that publication in a newspaper was not sufficient to fix the person charged with contravening an Order with knowledge of it, unless there were evidence to show that he subscribed to the newspaper or was likely to have seen the particular copy of it in which the Order had been printed. [P 12 C 2]

Prem Lal and S. C. Mukherjee —

for Petitioner.

Advocate-General, Government-Advocate, Public Prosecutor for Orissa and Gopal Prasad —

for the Crown.

Fazl Ali C. J. — This is a revision application on behalf of one Mahadeo Prasad Jaiswal who has been convicted under R. 81, cl. (4), Defence of India Rules, for breach of certain provisions of the Cotton Cloth and Yarn Control Order and has been sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 500. The petitioner is one of the owners of a cloth shop popularly known as the Jaiswal Cloth Depot and it has been found by the Courts below that on 1st August 1944 he sold to one Ishwar Singh, a retail dealer, some pieces of cloth at a price exceeding the mill price by more than 10 per cent. and thereby contravened the provisions of cls. 12 (4) and 12 (1), Cotton Cloth and Yarn Control Order. His defence in the Courts below was that he did not know that Ishwar Singh was a retail dealer and he therefore charged him such prices as he was entitled to demand from an ordinary consumer. This defence has however been negatived and it has been found that he sold the cloth to Ishwar Singh knowing him to be a retail dealer. This find-

ing is supported by the receipt which he issued to Ishwar Singh and which purports to be a receipt issued to a retail dealer. The finding of the Courts below cannot be challenged and has not been challenged in this Court.

The Cotton Cloth and Yarn Control Order of 1943 was made by the Central Government under R. 81 (2), Defence of India Rules, and published in the Government of India Gazette on 17th June 1943 (*see* Notification No. 34-Tex. (1)/43). It was also published by the Provincial Government of Bihar in the Gazette, Extraordinary, of 9th July 1943. The original Order has been amended from time to time and all the amendments have been duly published in the Gazette of India and the Official Gazette of the Bihar Government. The main point urged in this Court on behalf of the petitioner is that his conviction is invalid because the prosecution has failed to prove that the Cotton Cloth and Yarn Control Order was published in accordance with R. 119 (1), Defence of India Rules. Rule 119 (1) so far as it concerns this case runs as follows :

"Save as otherwise expressly provided in these Rules every authority, officer or person who makes any order in writing in pursuance of any of these Rules, shall in the case of an order of a general nature or affecting a class of persons publish notice of such order in such manner as may in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns.....and thereupon the persons concerned shall be deemed to have been duly informed of the order."

It is contended by the learned counsel for the petitioner that there has been no compliance with R. 119 (1) because there is no proof that the Central Government had decided that publication of the Cotton Cloth and Yarn Control Order in the Government of India Gazette was best adapted for informing persons whom the order concerns about its provisions. Such a proof, it is said, could be afforded if it was expressly stated by the Central Government that in its opinion publication in the Government of India Gazette was best adapted for informing the persons concerned of the provisions of the Order. A similar contention appears to have been raised and given effect to in 1945 P.W.N. 374¹ which was decided by a Bench of this Court on 4th September 1945, but as the Bench before which the present case came up held a contrary view, the learned Judges constituting that Bench have referred it to a Full Bench. Rule 119 occurs in

1. ('45) 1945 P. W. N. 374, *Kamta Prasad v. Emperor*.

part XVII, Defence of India Rules, which deals with "miscellaneous provisions." The subject which the Rule purports to deal with is indicated in the marginal notes as "Publication, affixation and defacement of notices." The rule clearly lays an obligation on the authority making an order of a general nature under the Defence of India Rules to publish notice of such order and to publish it in such manner as may, in the opinion of the authority concerned, be best adapted for informing persons whom the order concerns. It is only when this is done that the fiction of constructive notice which the latter part of R. 119 embodies will come into play and "the person concerned shall be deemed to have been duly informed of the order." The manner in which the notice is to be published is left to the discretion of the authority concerned and it is for such authority to decide what form of publication would be best adapted for informing persons whom the order concerns of its provisions. It follows therefore that once the authority has determined the manner of publication as provided in the rule it is not open to a Court of law or to any person to say that the manner of publication was inadequate or was not in fact adapted for informing persons concerned of the provisions of the Order. The Rule does not say that the authority should declare or state in writing that in its opinion the manner of publication decided upon in a particular case was best adapted for informing the persons concerned of the provisions of the Order. Therefore merely because there is no such declaration or statement or because the mode of publication does not appear to be suitable or adequate, we cannot conclude that the requirements of R. 119 (1) have not been complied with. It seems obvious that if a certain mode of publication appears to be inadequate the position is not improved by the order-making authority having made a formal statement that in its opinion it was the most suitable mode of publication. On the other hand, if no such statement has been made, the Court is not debarred from inferring from the manner in which a certain order has been published or other cogent evidence that the requirements of the Rule have been complied with. In the present case the Cotton Cloth and Yarn Control Order was admittedly published in the Gazette of India which, as is well known, is the official organ of the Government of India since 1863 when, by Act 21 of that year, publication in the Gazette of India

was declared to have the effect of publication in any other Official Gazette in which publication was prescribed by the law in force at the date of the passing of the Act. The preamble of the Act recites that

"the Governor-General had resolved to publish an official gazette called the Government of India Gazette containing such publications, notifications and other matters as the Governor-General of India in Council shall direct to be inserted therein."

Since this Act, was passed it has been the practice of the Central Government to publish all its statutory enactments, rules and orders by notification in its official gazette and I think that we may assume that they are published for the information of the public and by the direction and under the authority of the Central Government. In these circumstances I find it difficult to hold that though the Central Government was alive to the necessity of publishing the Order with which we are concerned, it did so without bearing in mind all the provisions of R. 119 by which the publication is made obligatory. I think that we can presume that the Central Government was aware that under R. 119 it was not only necessary to publish the Order but it was also necessary to publish it in the manner which in its opinion was best adapted for informing the persons whom the Order concerned of its provisions. If there had been no publication at all, the position might have been different; but when the order has been published and published in the manner in which all statutory rules and orders are published I cannot hold that R. 119 has not been complied with. I will now refer to certain cases in which the contrary view has been taken. The latest case is that in 1945 P. W. N. 374¹ in which a number of persons had moved the High Court against their conviction for breach of certain orders made by the Provincial Government under powers conferred by R. 81, Defence of India Rules. These orders had been published in the Bihar Gazette but it was held by a Bench of this Court that it could not be inferred or presumed from the publication of this order in the Bihar Gazette that that was the method which in the opinion of the Government was best adapted to inform the persons concerned of the provisions of the order. It seems, however, that in deciding the case the learned Judges who decided it merely followed an earlier decision of this Court in 1944 P. W. N. 571² as will

2. (1945) 32 A. I. R. 1945 Pat. 307 : 24 Pat. 29 : 1944 P. W. N. 571 : 26 P.L.T. 184, Jagarnath v. Emperor.

appear from the following extracts from the judgment of Beevor J.:

"It was contended on behalf of the Crown that we could infer or presume from the publication of the orders now in question in the Bihar Gazette that that was the method which had been chosen by the Government under the provisions of R. 119, Defence of India Rules. This argument was, however, overruled in the case above cited": 1944 P. W. N. 571.²

In view of this observation, it becomes necessary to examine the decision of this Court in 1944 P. W. N. 571.² In that case a certain person had been convicted not for breach of an order made by the Central or Provincial Government, but of an order made by a Sub-Divisional Officer fixing the price of certain grains. Das J. who delivered the judgment in that case, pointed out in his judgment that there was no direct evidence to show that the Sub-Divisional Officer had determined the manner in which his order should be published. In that case the only evidence on the record was the statement of a clerk employed in the Price Control Office and all that he stated was that the rate fixed by the Sub-Divisional Officer had been circulated to merchants and consumers in all markets of the subdivision. There was no evidence to show whether this was the manner of publication determined by the Sub-Divisional Officer or by some one connected with the Price Control Office and whether the circulation was before or after the date when the offence is said to have been committed. In these circumstances while allowing the application Das J. observed:

"It was essential for the prosecution to prove in this case that the Subdivisional Officer had determined the manner in which notice of the order was to be published, and that the order had been so published before the alleged offence had been committed by the petitioner."

It is contended before us that there is no difference in principle between an order made by a Sub-Divisional Officer and an order of the Central or Provincial Government for the purpose of R. 119, Defence of India Rules. This is undoubtedly correct, but it cannot be overlooked that so far as the Central and Provincial Governments are concerned, they normally and usually publish their statutes and orders in their official gazette, and therefore if an order under the Defence of India Rules is published in the official gazette, it may well be presumed, for reasons already stated, that that has been done because, in the opinion of the authority concerned, (whether the opinion be right or wrong) that was the

manner best adapted for the purpose of conveying information of the order to the persons concerned. The position is, however, somewhat different where the order is made by an authority or officer subordinate to the Central or Provincial Government who has not at his disposal any recognised machinery or medium for publishing and notifying the orders made by him and who has to select in each case his own method of promulgating them. In such a case it may become necessary to enquire whether there was any publication at all of the order and if so, whether the publication was made by the authority or officer in full compliance with the provisions of R. 119 (1) including the provision as to his determining the most suitable form of publication. If it is found that the authority or officer concerned has acted in an arbitrary or careless manner, the onus must fall heavily on the prosecution to show that R. 119 was intended to be, and was in fact, complied with.

In A. I. R. 1945 Pat. 119³ the position was not very different from the case which I have just now discussed. In that case also the accused was charged with breach of an order passed by a Sub-Divisional Officer and it was found that there was no direct evidence as to the opinion of the Sub-Divisional Officer relating to the manner best adapted for informing persons concerned of the order or its contents. In A. I. R. 1945 Pat. 306⁴ which was also a case involving the breach of an order made by the Sub-Divisional Officer, Agarwala J. observed:

"In the present case there is no evidence on the record that the order prohibiting the sale of kerosine oil in bulk or fixing the maximum price of it was promulgated in the manner directed by the Subdivisional Magistrate of Siwan, or indeed that the Subdivisional Magistrate gave any directions in this behalf at all."

In 1945 A. L. J. 357⁵ Mulla J. set aside the conviction of an accused person who had been convicted for breach of an order made by the District Magistrate and observed:

"It was for the District Magistrate to prescribe the method of publication and upon the evidence on this record it appears to me that no such method was prescribed by the District Magistrate who passed the order dated 7th October 1942."

In A. I. R. 1945 Bom. 389⁶ also the conviction was for a breach of an order made by

3. (45) 32 A. I. R. 1945 Pat. 119 : 211 I. C. 241, Madan Lal Dalmia v. Emperor.

4. (45) 32 A. I. R. 1945 Pat. 306, Ramkishore Prasad v. Emperor.

5. (45) 32 A. I. R. 1945 All. 280 : I. L. R. (1945) All. 682; 1945 A. L. J. 357, Krishna v. Emperor.

6. (45) 32 A. I. R. 1945 Bom. 389, Mhatarji Bhau Patil v. Emperor.

the District Magistrate but the accused was acquitted on the finding that there was no due publication of the order at all. In A.I.R. 1945 Bom. 368⁷ a Bench of the Bombay High Court acquitted two persons who were charged with the breach of an order made by the Provincial Government of Bombay and published in the Bombay Gazette. The learned Judges who decided the case rightly pointed out that unless the prosecution shows that there was due compliance with the provisions of R. 119 it would not be entitled to the presumption regarding notice to the accused mentioned in the last part of sub-r. (1); but they also proceeded to hold that where there was absence of evidence as to how, in the opinion of the authority issuing the notification, the notification was to be published, recourse could not be had to the provisions of S. 114, Evidence Act, and the presumption did not arise that the issuing authority had decided that the notification was to be published in the Bombay Government Gazette alone. As to why the presumption under S. 114 was not available to the prosecution the learned Judges observed as follows:

"The meaning of S. 114, Illust. (e), Evidence Act, is that if an official act is proved to have been done, it will be presumed to have been regularly done and that it does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to the case. It seems to us that the burden of proving the manner which in the opinion of the authority issuing the notification was best adapted to inform the persons concerned was on the prosecution and that that burden has not been discharged."

Section 114, Evidence Act, is a general section and it provides that the Court may

"presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in relation to the facts of the particular case."

The Illustrations which are appended to the section are not exhaustive, but merely illustrate the principle underlying the main provision. The presumption to be drawn under this section is one of fact and whether it should be drawn or not in a particular case must depend upon the facts of that case. It seems to me that where the order has been notified in an official publication where all statutory rules and orders are published normally and usually and it appears that the order has been so published because its publication is essential under R. 119, it may be presumed that the publication was made not merely in partial compli-

ance with R. 119 but in compliance with all its provisions including the provision as to the determination of the most suitable form of publication. I have come to this conclusion not because I consider that mere publication in the official gazette must necessarily be regarded as an adequate form of publication, but because in my judgment that is the only correct conclusion one can come to upon the language of R. 119 (1) as it stands at present. I am aware that a vast majority of the persons who are affected by the numerous orders made under the Defence of India Rules seldom read the official gazettes and though it is expected that the important orders and notifications published in the official gazettes will be copied and re-published by all the leading newspapers, that is not always done. In these circumstances there is obviously a great responsibility on the authority issuing orders of a general nature under Defence of India Rules to exercise the discretion which the law vests in him as to the choice of the most suitable form of publication properly and wisely and it seems to me that the Central Government has taken a step in the right direction by stating in its notification dated 21st July 1945 which re-publishes the Cotton Cloth and Yarn Control Order that it will issue a press note summarising and explaining its provisions.

The learned Advocate-General contended that in the Defence of India Act and the rules framed thereunder a distinction has been drawn between the Provincial and the Central Government on the one hand and "an authority, officer or person" subordinate to the Central and Provincial Governments on the other (see ss. 2 (3), 2 (4) and 2 (5)); that the word "authority" as used in R. 119 does not refer to or include the Provincial or Central Government; and that R. 119 (1) is intended to apply only to those cases where an order has been made by an authority, officer or person subordinate to the Central or the Provincial Governments to whom the power of making the order may have been delegated under S. 2 clauses (4) and (5). It is contended by him that so far as the Central and Provincial Governments are concerned, it was not necessary to make any provision for the publication of the orders made by them because their orders are usually published in their Official Gazette. It was, however, necessary to prescribe some mode of publication in the case of subordinate authorities and R. 119 was enacted for this purpose. This argument, how-

7. (45) 32 A. I. R. 1945 Bom. 368, Leslie Gwilt v. Emperor.

ever plausible it might have appeared to be, upon the language of the rule as it originally stood, can have in my opinion no force now in view of sub-r. (1-A) of R. 119 and certain notifications issued by the Central and the Provincial Governments while re-publishing the Cotton Cloth and Yarn Control Order. Sub-rule (1-A) runs as follows:

"Where any of these rules empowers an authority, officer or person to take action by notified order, the provisions of sub-r. (1) shall not apply in relation to such order and all persons whom the order concerns shall upon its notification be deemed to have been duly informed of it."

According to the Defence of India Rules notified orders and notification respectively mean "notified orders and notification in the official gazette." Therefore, obviously R. 119 (1A) will cover orders made by the Central and the Provincial Governments and it has been enacted on the supposition that the word "authority" has been used in the wider sense so as to include the Central and the Provincial Governments also. Again, the Cotton Cloth and Yarn Control Order has been re-published in the Gazette of India on 21st July 1945 in these words:

"In exercise of the powers conferred by sub-r. (2) of R. 81, Defence of India Rules, the Central Government is pleased to make the following order and to direct with reference to sub-r. (1) of R. 119 of the said Rules that notice of the order shall be given by the publication of the same in the official gazette and by the issue of a press note summarising and explaining its provisions."

Similarly, the Bihar Government have re-published the order on 17th July 1945 after specifying that the Governor of Bihar is of the opinion that publication of notice of the said order in the Bihar Gazette is the manner of publication best adapted for informing persons whom the said order concerned of the terms thereof. In some of the cases to which I have referred, it was assumed that the word "authority" used in R. 119 was wide enough to cover Central and Provincial Governments and this view has apparently been accepted in the notifications cited above which were issued to meet the point raised by those decisions. It cannot therefore be urged now that R. 119 does not apply to an order made by the Central or the Provincial Government. I shall now say a few words in regard to a matter arising out of the following observations of Meredith J., one of the Judges who have referred this case to the Full Bench:

"Rule 119 seems to me to have been inserted so as to enable the prosecution if a certain course has been adopted, to claim a presumption that the accused must have known of the order in question.

If the procedure has been followed the rule says that the person concerned shall be deemed to have knowledge. In my opinion the only effect of failure to comply with the provisions of R. 119 will be that the person concerned cannot be deemed to have knowledge and it will be necessary for the prosecution to prove it independently. I cannot see how, if the statutory rule is regularly made by Government which states that it will come into force upon a certain date, it will fail to come into force on that date, because a particular procedure enjoined for publication has not been followed. The same view which I have just stated as my own has been adopted by a Bench of the Bombay High Court in *I. L. R. 1945 Bom. 103*⁸ and with respect I find myself in agreement with the reasoning of those learned Judges."

In the case to which reference has been made by Meredith J., *I. L. R. 1945 Bom. 103*,⁸ Macklin J., after referring to R. 119 (1), observes:

"We think that the consequence of failure to carry out the provisions of R. 119 is practical rather than legal. The result would be that the prosecution would lose a simple method of establishing beyond controversy that the person affected had received notice of the order affecting him and that the person affected would find it easier to establish the fact that he had not received notice, assuming that in any particular case the burden of proof were upon him to prove affirmatively that he had not received notice."

In my opinion if R. 119 (1) is not complied with at all, the consequences may be disastrous. If there is no publication whatsoever, how can it be proved or said (1) that the order in question has become operative and (2) that the accused had knowledge of the order contravened? Therefore it will be going too far to say that non-compliance with R. 119 (1) will involve no legal consequences and will merely deprive the prosecution of a simple method of establishing that the person affected had notice of the order affecting him. The reason for enacting R. 119 appears to me to have been correctly stated by my brother Agarwala in *A. I. R. 1945 Pat. 306*⁴ in these words:

"Although there is the ordinary presumption of law that every citizen knows the law, Rule 119, Defence of India Rules, is apparently based on the fact that no citizen, however diligent he may be, can hope to keep pace with the issue of the rules made under the Defence of India Act and their various amendments. It has therefore been provided that the person making orders under the Defence of India Rules shall take steps to ensure that the orders are promulgated in such a manner that they will reach the persons who will be affected by them."

It will be noticed that when R. 119 (1) was originally enacted on 3rd September 1939 the words

"thereupon the persons, corporation, firm or person concerned shall be deemed to have been duly informed of the order"

8. ('44) 31 A. I. R. 1944 Bom. 259 : *I. L. R. (1945) Bom. 103*, *Emperor v. Rayangouda Lingangouda*.

did not occur in the rule. These words were subsequently inserted on 10th January 1942 (*see* Notification No. 1020/OR/1/41). This by itself should suggest that publication of the orders of a general nature or orders affecting a class of persons was held to be essential when the rule was originally framed. Obviously such orders cannot be assumed to have come into operation unless they are published and this can be illustrated by a simple example. Let us suppose that the authority or the person who makes an order puts it in a safe after signing it and decides to publish it a fortnight later. I doubt very much if in such a case a person who contravenes the order before its publication can be punished for contravening it merely because it is proved that by some means he had become aware of the contents of the order. Similarly, I doubt if in the case before us the petitioner could have been convicted if he had sold the cloth before the Cotton Cloth and Yarn Control Order was published by the Central and the Bihar Government. I am, however, prepared to concede that if there is some evidence as to the publication of an order, though the publication may be seemingly inadequate, and it is also proved that the accused had knowledge of the order then the Courts will not, as a rule, insist on very strict proof of the other ingredient of the rule, namely that the authority or the officer making the order had exercised his mind to determine that the order was to be published in the manner best adapted for informing the persons concerned of its contents. This point, however, need not be pursued because in my opinion this case can be disposed of on the short ground that there has been no contravention of the provisions of R. 119 (1).

It will be noticed that the provision as to the determination of the most suitable form of publication applies only to orders of a general nature or order affecting a class of persons. It does not apply to orders which are addressed to an individual person or an individual corporation or firm. In regard to such orders all that R. 119 requires is that they should be served in the manner provided in the rule and where such service is effected the presumption embodied in the latter part of the rule will automatically follow. As far as I am aware no difficulty has been experienced up till now in the working of this part of the rule and I do not consider it necessary to deal with it in this judgment.

As the only substantial point which is

raised on behalf of the petitioner fails I would dismiss the petitioner's application and uphold his conviction and sentence.

Agarwala J. — The question of law which led to this case being referred to a Full Bench is not, in my opinion, of any real importance in the present instance. By S. 2 (1), Defence of India Act, 1939, the Central Government was empowered to make, "by notification in the official" Gazette, such rules as appear to it to be necessary or expedient for, inter alia, maintaining supplies essential to the life of the community. In exercise of this power the Central Government made the Defence of India Rules by Notification No. 221/1 or, which were published in the Gazette of India Extraordinary, dated 3rd September 1939. Rule 81 (2) of these rules authorised the Central Government (and, later, the Provincial Government) to make orders, so far as appears to it to be necessary or expedient for, inter alia, maintaining supplies essential to the life of the community. Clauses (a) to (f) of R. 81 (2) particularize the kind of orders contemplated, e. g., "cl. (b) for controlling the prices or rates at which articles or things of any description whatsoever may be sold" Rule 119 (1) prescribed the method of publishing orders made in pursuance of the powers conferred by the various provisions of the Defence of India Rules, including, of course, R. 81 (2), and declared that "thereupon" the persons, corporation, firm or person concerned shall be deemed to have been duly informed of the order. The word, "thereupon" in this context must, I think, mean . . . "on publication of the order in the manner required by this rule," and it has not been suggested that it means anything else. Rule 119 (1) requires different methods of publication according to whether a particular order (a) is one of a general nature or affecting a class of persons, or (b) is one affecting an individual corporation or firm, or (c) is one affecting an individual person.

The order we are concerned with is an order affecting a class of persons, viz., persons dealing in cotton cloth and yarn. Rule 119 (1) requires the authority, officer or person making such an order to publish notice of it in such manner as may, in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns. It has, of course, never been suggested that an order purporting to be made in exercise of powers conferred by any of the Defence of India Rules would be

effective without publication, but in cases which have come before this and other High Courts two questions have arisen with regard to the manner of publication, viz., (i) whether, in the case of an order made by a Provincial Government, mere publication in the Official Gazette is a sufficient compliance with R. 119 (1) without proof that the Provincial Government was of opinion that publication in the gazette is the manner best adapted for informing persons whom the order concerns, and (ii) whether, in the case of an order made by any other authority, officer or person, proof was necessary that the order had been published in such manner as was, in the opinion of the authority, officer or person making the order, best adapted for informing persons whom the order concerns.

In the two cases in which the first of these questions arose it was answered in the negative; see A.I.R. 1945 Bom. 363⁷ and 1945 P. W. N. 374.¹ The second question has been answered in the negative, or it has been indicated that it would have been so answered had it been necessary to decide the question in 24 Pat. 29,² A.I.R. 1945 Pat. 119,³ A.I.R. 1945 Pat. 294,⁹ A.I.R. 1945 Pat. 306,⁴ A.I.R. 1944 Nag. 40,¹⁰ A.I.R. 1945 Nag. 159,¹¹ A.I.R. 1945 ALL. 280⁵ and A.I.R. 1945 Bom. 389.⁶ In the last mentioned case the order had been made by a District Magistrate and published in the Official Gazette, but it was not proved that this was the manner which, in the opinion of the District Magistrate, was best adapted for informing the persons concerned. The contrary view was taken in I.L.R. (1945) Bom. 103.⁸

It is noticeable that some of the Defence of India Rules enable action to be taken by a "notified order," e.g., Rules 26 (5) (B) (a), 27A, 50A (1), 51L, 67A (2), 84 (2) and (3), 68 (1), 80A (1), 92, 94 (2) and (3) and 115 (2). Of these, Rules 26 (5) (B) (a), 27A and 51L enable either the Central or Provincial Government to proceed by way of a "notified order," while the remainder apply only to the Central Government. "Notified" means notified in the Official Gazette, *vide* R. 2 (3). In the case of a notified order the provisions of R. 119 (1) do not apply: *vide* S. 119 (1-A). Rule 81 (2) does not authorise either the Central or the Provincial Govern-

ment to proceed by way of a mere notified order. Consequently, it is arguable that the framers of the Defence of India Rules did not intend either the Central or the Provincial Government to do so (except, of course, when that is considered the best method of publication) or they would have said so as in the case of the Rules enumerated above; or, alternatively, when cl. (1-A) was added to R. 119 they would have said that sub-r. (1) did not apply to an order published in the Official Gazette.

What we are concerned with in the present case is an order of the Central Government, namely, the Cotton Cloth and Yarn (Control) Order, dated 17th June 1943, and published with Notification 34 Text. A (1)/13/43 which was published in the Gazette of India on 22nd January 1944. It was not proved that at the date of its original publication the Central Government was of opinion that in its opinion the manner of publication best adapted for informing the persons concerned was publication in the Gazette of India. It was re-published on 21st July 1945, with a declaration that in the opinion of the Central Government publication in the Gazette of India was the manner best adapted for informing the persons concerned. The petitioners, however, were charged with a breach of this Order committed on 1st August 1944, i. e., before re-publication of the Order in the Gazette of India. What has to be decided, therefore, is whether the original publication was a sufficient compliance with the requirements of the law. The answer to that question must, in my opinion, be in the affirmative in the present case. As I have already stated at the beginning of this judgment the Central Government was empowered by S. 2 (1), Defence of India Act, to make, "by notification in the Official Gazette," rules for maintaining supplies essential to the life of the community. Control of prices and rates of supplies is essential for the life of the community in times of such extreme emergency as we have been and are passing through, and the Order in question was published in the Official Gazette. It is true that the Order purports to be made in pursuance of powers conferred by R. 81 (2), Defence of India Rules, but that, in my opinion, is immaterial. The Defence of India Rules are merely rules framed to give effect to S. 2, Defence of India Act, and, so far as the Central Government is concerned, an order which it has power to make in pursuance of the Defence of India Rules is also within

9. ('45) 32 A.I.R. 1945 Pat. 294 : 220 I. C. 421, Chakradhar Sahu v. Emperor.

10. ('44) 31 A.I.R. 1944 Nag. 40 : I.L.R. (1944) Nag. 150 : 211 I. C. 29, Shakoor Hasan Kachhi v. Emperor.

11. ('45) 32 A.I.R. 1945 Nag. 159 : I.L.R. (1945) Nag. 382, L. M. Wakhare v. Emperor.

the powers it has under S. 2 (1) of the Act which merely requires publication in the Official Gazette, as was done in the present case.

Manohar Lall J. — I have had the advantage of reading and considering the judgment prepared by my Lord the Chief Justice. I agree generally with the reasons for the conclusion arrived at, but in deference to the able arguments addressed to us by the learned counsel for the petitioner and the learned Advocate-General, and to the different views which have been taken by the learned Judges in this Court and in other High Courts, it is but right and proper that I should make some observations of my own. The facts have been fully stated in the judgment of my Lord the Chief Justice. The question for decision is as to whether the provisions of R. 119 (1), Defence of India Rules, have been proved to have been complied with so that the accused must be deemed in this case to have been duly informed of the order namely the Cotton Cloth and Yarn Control Order, hereinafter to be described as the Cotton Order. There is no dispute that the Cotton Order was made by the Central Government under R. 81 (2), Defence of India Rules, and published in the Government of India Gazette on 17th June 1943, and that it was again republished in the Government of India Gazette on 22nd January 1944, and was later on published by the Provincial Government of Bihar in the Gazette Extraordinary of 18th February 1944. The contention of the petitioner is that in none of the publications was it stated that in the opinion of the Central Government or the Provincial Government this mode of publication was best adapted for informing persons whom the order concerns, and, therefore, the accused cannot be deemed to have been duly informed of that order.

My Lord the Chief Justice has shown that ever since 1863 it is the recognized practice of the Central Government to publish all its statutory enactments, rules and orders by notification in the Official Gazette of the Government of India, and similarly all the statutory enactments, rules and orders of the Provincial Government are being published in the Official Gazette of the province, and this practice is fully known to the public. In the present case the Central Government has followed this practice, and the question is whether the omission to state in the Gazette, or the omission by the prosecution to prove by other evi-

dence that this mode of publication was in the opinion of the Central Government best adapted for informing the persons concerned, results in the conclusion that the accused cannot be deemed to have been duly informed of the order. I am of the opinion that where the Central Government or the Provincial Government publish the notification in question in their Official Gazette, which is the normal way in which such notifications are published by these authorities, no further question can arise for the consideration of the Courts. But if they adopt an unusual mode of publication, then they must satisfy the Courts that the particular abnormal mode of publication was adopted by them because in their opinion it was best adapted in the circumstances for informing the persons whom the order concerned. It must be remembered that the Courts cannot question the manner, however, inadequate it may appear to them, in which the authority decides that the notification should be published.

I am unable to accept the view that the Court in such cases should, or is entitled to, draw a presumption under S. 114, Evidence Act, that the Central Government or the Provincial Government, as the case may be, formed such an opinion before the publication was ordered although this may appear to be an easy and attractive solution of the difficulty. If a presumption can be drawn it is obvious that it must be a rebuttable presumption so that the accused would be entitled to show either by direct evidence or by requiring the Crown to prove that this ingredient of the rule has been complied with. The onus is always upon the Crown and never shifts on to the accused except where the statute so directs: see 1935 A. C. 462¹² and 1936 A. C. 338.¹³ It would be unreasonable to require the accused to produce evidence which is in the possession of the Crown. Now, if the prosecution must produce that evidence it may lead to an impossible and unworkable situation in the case of the Central or the Provincial Government and this could never have been the intention of the rule-making authority, and unless we are forced by the language of R. 119 it should be so construed as to avoid the unreasonable result indicated. This can

12. (1935) 1935 A. C. 462 : 104 L. J. K. B. 433 : 153 L. T. 232, *Woolmington v. Director of Public Prosecutions*.

13. (1936) 23 A. I. R. 1936 P. C. 169 : 162 I. C. 450 : 1936 A. C. 338 : 105 L. J. P. C. 79 : 154 L. T. 620 : 1936-2 All E. R. 116 (P. C.), *Attygalle v. The King*.

be done by construing the rule in the manner stated by me above, and this in my opinion is not a strained construction of the rule.

It may be suggested that in a way I am drawing a presumption that the Central Government had formed the opinion that the publication in the Official Gazette was best adapted for informing the persons of the Cotton Order, but upon a proper construction of the rule I am adopting the view that the Central Government or the Provincial Government is required to form the opinion only in cases where they are going to adopt a manner of publication other than the normal manner in which their Acts and notifications are published in the Official Gazette. The reason for the insertion of the general words in the rule directing the determination of the manner best adapted to the circumstances appears to be that the rule applies equally to the Central Government or the Provincial Government or to any other authority, officer or person who may be authorised to pass an order of a general nature affecting a class of persons. Except the Central Government or the Provincial Government, the other officers or authorities, or persons have no recognised mode in which they bring their orders to the notice of the public, and, therefore, in their case it is necessary that the rule should be strictly construed and the prosecution should establish that the authority, officer or person did form an opinion that the particular manner of publication adopted in that case was best adapted for informing the persons whom the order concerned.

Learned counsel for the petitioner contended by drawing attention to the well-known principles in *Craes on Statute Law* and *Maxwell on Interpretation of Statutes* that where a statute directs a particular thing to be done in a particular way, the thing must be proved to have been done in that way and in no other way before the statute can be validly enforced. The principle so laid down is well recognised and cannot be questioned. In the present case the publication has been made, and as it is not made in a manner other than the normal mode in which the order and enactments of the Central Government are made, I must hold that the requirements of R. 119 (1) have been complied with. The learned Advocate-General presented an attractive argument that R. 119 (1) has no application to a case where the Central Government or the Provincial Government makes an order in

writing in pursuance of any of the Rules of the Defence of India Act. This argument is strongly supported by a consideration of the various provisions of the Defence of India Act and Rules. But in my opinion, after the insertion of R. (1A) in R. 119 on 6th May 1944—which is before the date upon which the accused is said to have committed the offence in the present case—this argument is not available to the learned Advocate-General apart from the fact that in the numerous cases which have been brought to our notice, and which have been considered by my Lord the Chief Justice in his judgment, this contention was never advanced on behalf of the Crown. The learned Advocate-General also stated that the alteration of the rule by this amendment was made in deference to the various decisions of the High Courts and did not lead to the inference that those decisions were correct. It is enough to state, as was stated by their Lordships in 61 I. A. 41,¹⁴ at page 49,

“that an alteration by the legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion.”

I may also observe that in my opinion even if the accused is able to prove that he never knew in fact of the passing of a particular order of a general nature, he will not be entitled to an acquittal if the prosecution establish that the requirements of R. 119 (1) have been complied with, because the essence of the matter is that whether the accused knew or did not know of such an order, he shall be “deemed to know” as is provided by the rule. Observe that the concluding words of the rule are “thereupon the person shall be deemed to have been duly informed of the order.” Now, when a person is ‘deemed to be’ something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were: per Viscount Dunedin in the case of 57 I. A. 49¹⁵ at the bottom of p. 55. The publication required by R. 119 results, so the rule enacts, in it being deemed that the person concerned has been duly informed, although in reality he has not been duly informed. This supports me in the view that the prosecution is relieved

14. (34) 21 A. I. R. 1934 P. C. 45 : 15 Lah. 224 : 61 I. A. 41 : 147 I. C. 899 (P. C.), *Bharat Insurance Co. Ltd. v. Income-tax Commissioner, Punjab*.

15. (30) 17 A. I. R. 1930 P. C. 54 : 54 Bom. 216 : 57 I. A. 49 : 121 I. C. 532 (P. C.), *Commr. of Income-tax, Bombay v. Bombay Trust Corporation, Ltd.*

from the burden of proving that the accused has been in fact informed; he may not have been informed, but he shall be deemed to have been informed if the requirements of the rule are complied with. An argument was advanced that upon a proper interpretation of R. 119 (1A), inserted on 6th May 1944, before the date of the alleged offence in the present case, it should be held that the rule-making authorities have now accepted the interpretation placed by the various High Courts in India that it is only in cases where action is permissible by a notified order under the various rules that the persons whom the order concerns shall, upon notification, be deemed to have been duly informed of it, and as in the present case the Central Government is not empowered under R. 81 to take action by a notified order with regard to the Cotton Order, the provision in sub-s. (1) of R. 119 must be accurately complied with. This argument appears to be plausible, but a proper interpretation of R. 119 (1) even after this amendment leads me to the conclusion which I have already expressed above.

Although after considering the able arguments addressed to us I have come to the conclusion that the contention of the accused should not prevail, it is desirable to point out that the Central Government and the Provincial Government should, in future, direct the publication of the relevant orders by inserting a statement that this mode of publication is best adapted for the information of the persons concerned so that the accused may have no grievance whatsoever. I am refraining from making my own observations as to the cases cited before us from this Court and from the other High Courts as they have been sufficiently dealt with in the judgment of my Lord the Chief Justice. For these reasons I am in agreement with the order proposed by my Lord the Chief Justice that the application of the accused should be dismissed.

Shearer J. — I agree with the conclusion arrived at by my Lord the Chief Justice, and in the main I also agree with the reasoning by which that conclusion is supported. As Maule J. said in (1846) 2 C. B. 706¹⁶ at p. 719 :

"There is no presumption that every person knows the law: it would be contrary to common-sense and reason if it were so."

There is, and has, however, for centuries been a rule that ignorance of the law shall

not excuse a man or relieve him from the consequence of a crime. Rule 119, Defence of India Rules, merely embodies that rule and provides that, when an order of this kind has been made and has been duly published then, from the moment it had been duly published, ignorance of the existence of the order is no defence; in other words, it provides that the order comes into operation from the moment it has been duly published. The words

"in such manner as may in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns"

appear to me to have been inserted in order to prevent its being contended, or in order to reduce the number of cases in which it might plausibly be contended, that what had been done in a particular case did not amount in law or in fact to publication. In the absence of some such words it might, for instance, have been argued that publication in a newspaper was not sufficient to fix the person charged with contravening an order with knowledge of it, unless there were evidence to show that he subscribed to the newspaper or was likely to have seen the particular copy of it in which the order had been printed. The words "publish" and "publication" occur in various English statutes and have been the subject of judicial interpretation, and it would have been easy to find decisions to support arguments of that kind. The rule-making authority intended, in my opinion, to lay stress on the word "publish" rather than on the words "in such manner, etc.," which are no more than a kind of adverbial qualification of the word "publish." That, I think, is clear for two reasons. In the first place, as my Lord the Chief Justice has pointed out, the Rule does not require the authority, officer or person to set out in writing the manner in which the order he has made is to be published, and this would not, I think, have been so, if it had been intended that any omission to carry out a single one of his directions was to have the effect of rendering the order wholly nugatory. Secondly, it is obvious that in the great majority of cases the actual publication of the order must be left to a number, and perhaps a large number, of agents some of them reliable and some of them a good deal less reliable. Can it be supposed that an omission on the part of one of these agents to carry out in every respect the directions which he has received is to have such serious consequences? If

16. (1846) 2 C. B. 706 : 15 L. J. C. P. 91 : 69 R. R. 602, *Martindale v. Mary Falkner*.

this is so, officers making orders will certainly be discouraged from giving explicit and detailed instructions regarding the manner in which they are to be published, and persons adversely affected by them may be encouraged to bribe some underling charged with their publication to disobey his instructions. Das J. in 26 P. L. T. 184² refers to the "legal fiction of R. 119," and in this and other decisions there is an implication that R. 119 embodies some principle of a novel and harsh kind. But is this really so? The rule that ignorance of the law is no defence to a crime may be a harsh rule. But there is nothing new about it. It is of universal application and is as old as law itself. Promulgation has never been a condition precedent either in England or in India to statutes coming into operation. Publication of orders of this kind is, however, required. If, on one and the same day, an order of this kind affecting the public in a particular local area was made and duly published by a Sub-Divisional Magistrate, and an Act was passed by the Central Legislature, would the persons affected by both of them be at all likely to become acquainted with the Act sooner than with the order? The persons who make these orders make them for the purpose of achieving some object and they have sufficient commonsense to realise that the best way of achieving the object is to try and ensure that the order is made generally known. Rule 119, as I have already said, merely contains a provision as to when and how orders of this kind are to become operative. There must be "publication" and the publication must be "in a manner ordered or approved by the authority, officer, or person who made the order." If the person, who made the order, ordered it to be proclaimed by beat of drum at a certain place and time, and some subordinate had a number of handbills printed containing the order and distributed them more or less widely, there might perhaps be publication, but it would not be publication, in a proper manner.

On the other hand, if the maker of the order directed it to be sent to half a dozen newspapers for publication, and some of them published it and others did not, the position would, I am inclined to think, be very different. As wide publicity might not have been given to the order as was aimed at by the authority who made it and a Court would, no doubt, be justified in taking that into consideration in awarding

punishment. But there would, in such a case, be "publication" and there would also be "publication in the manner ordered or approved by the authority." The words that occur in R. 119 are "in such manner" and not "to such extent" and it has to be remembered that if the order does not, in consequence of what has actually been done come into operation, then persons who may be perfectly well aware of it commit no offence by disobeying it. I do not myself think that the words "in such manner" are, in this context, capable of being construed as synonymous with "to such an extent" or "not less widely than" but even if there were room for ambiguity I should not feel at liberty to construe them in the latter way. This is emergency legislation. During six years of war our deliberations have never been disturbed even by the drone of a hostile aeroplane. But the point we are now called upon to decide might as well have arisen out of an order passed by, let us say, the Deputy Commissioner of Kohima when the Japanese invasion was impending and some measures of precaution for the public safety had to be taken immediately, as out of an order passed by a Sub-Divisional Magistrate, possibly, in an excess of zeal, in some peaceful part of Bihar, and being a point of law it has to be decided precisely in the same way in either case.

In (1859) 7 C. B. (N.S.) 58¹⁷ a person was charged with having contravened a bye-law of the railway company. The statute required that the bye-laws of the company should be exhibited on notice-boards at every one of their stations and wharves. At the trial evidence was adduced to show that the bye-laws had been exhibited at the station at which the person charged got into the train and also at the station at which he got out of it. It was contended that evidence should have been adduced that the bye-laws had also been exhibited at every one of the other eighty or more stations of the company. This contention was overruled and it was held that in the circumstances the presumption *omnia rite esse acta* might be applied. Erle C. J., observed "there is a strong presumption that a public body has performed the duty which the law casts upon them." The duty which R. 119 casts on an authority, officer or person making an order is a duty to publish it in such manner as, in his

17. (1859) 7 C. B. (N.S.) 58 : 29 L. J. M. C. 57 : 121 R. R. 373, *Molteram v. Eastern Counties Ry. Co.*

opinion, is best adapted to inform the persons concerned. If the rule had required him to publish it in a certain specified manner, and there was evidence of publication, it would certainly have been open to a Court to presume that the duty imposed on him by the rule had been performed. What difference, in principle, can it make that he is given a discretion to choose his own mode of publication? If one officer is required to do a certain act in a particular manner, and another is required to do precisely the same act but given a discretion as to how he is to do it, why should it be permissible to presume that the former has done the act and not at all permissible to presume that the latter has done it? I should myself have thought that the presumption in the latter case was, if anything, stronger than in the former. Das J., who dealt with this difficult point rather more fully than any one else, assumed that two quite separate and distinct duties were imposed on the authority, officer or person making an order namely, a duty to determine the manner of publication and then a duty to see that publication was actually made in that manner. To construe the rule in this way is, I think, myself and have already said so, to put something of a strain on the language used.

Assuming it, however, to be correct, does it make any real difference? Publication must be made generally, if not always, through agents. Surely, regard being had to "the ordinary course . . . of human conduct and public and private business" a presumption arises that the agent did what he was told to do and not something quite different. But that amounts to a presumption that the authority, officer or person who made the order had performed the first of the two duties which Das J., supposes to be cast on him. It seems to me impossible to dissociate the mental process from the act which follows it. It is in the last resort to what is actually done that we must look. If a single copy of an order is stuck up on an obscure notice-board, one might legitimately presume, not that there was no publication, because, in point of fact, there would in such a case be some publication, but that the publication was not a proper or valid publication. What difference can it make if, in such a case, the person who has made the order has directed that it should be published in that manner? A Court would be bound to presume from what was done, that as no reasonable man

could suppose this was the manner best adapted for informing the persons concerned, the opinion was not an opinion formed or entertained in good faith. In the case with which we are now concerned, the order was an order of the Central Government and was published in the Gazette. It would be ridiculous not to presume that this publication was not ordered or approved by the Central Government. I do not myself think that this was the manner of publication best adapted or indeed at all well adapted for informing the persons concerned; but as, for a great many years this has been the usual method of publishing orders of this kind, it is scarcely possible to say that there was not a proper exercise of discretion. Between these two extreme cases there may lie a great variety of others. I agree with my Lord the Chief Justice in thinking that in every case a Court must look to the evidence relating to publication and decide for itself whether or not any presumption can be drawn from it. But, speaking for myself, I think the Courts should not be overcautious in making use of these presumptions.

The rule does not require an authority, officer or person making an order to state in writing how it is to be published; still less, does it provide that such writing or a certified copy of it shall be received as *prima facie* evidence. In every case, therefore, where it has to be proved what the mode of publication decided on was, it will be necessary to put the actual maker of the order into the witness-box. If this has to be done frequently, there is bound to be much dislocation of public business, and the rule-making authority may well consider that the only remedy is to require the authority, officer or person to give a certificate, stating that it has been published in a certain manner and provide further that such certificate shall be received as conclusive proof of publication. I think myself, it would be a great pity if such a course had to be adopted. I am unable to subscribe to the view implicitly, if not very clearly or rather definitely expressed in 26 P. L. T. 184² and some other decisions that, once an authority, officer or person making an order has given directions as to the manner of its publication, these directions are to have precisely the same legal effect as a provision in an English statute requiring a local body or a railway company to publish its bye-laws. The rule-making authority has given, and, I imagine, had to give, a wide discretion to

every authority, officer or person making such orders to decide in what manner they should be published. It is not, I think, for the Courts to ascertain in every single case exactly how this discretion has been exercised. It is only when the evidence relating to publication creates a suspicion that the discretion has been exercised in such a way as to amount in law to no exercise in good faith, of the discretion at all that the matter need or ought to be further investigated, if necessary, and, in the last resort, as matters now stand, by putting the person who made the order into the witness-box.

No doubt it is incumbent on the prosecution to prove every fact necessary to bring home a charge to an accused person. If, on appeal, it is contended that some such fact has not been proved, it is no answer for the Crown to say that the fact was never disputed at the trial, and that, if it had been, proof of it could very easily have been given. The reason, presumably, is that, in the absence of the necessary evidence, the Judge or Magistrate was not and could not have been satisfied of the existence of the fact. The existence of a law, or of a rule or order having the force of law, may in the last resort be a fact; but is it a fact which stands on precisely the same footing? At a trial for a contravention of an order of this kind the existence of the order may be well known to the presiding Magistrate, the Public Prosecutor and the pleader for the defence. No one may dispute either its existence or that it was in operation prior to the date of the alleged offence. If, in such a case, the trying Magistrate wrongly assumes a knowledge of it without proof, is a Court of appeal or a Court of revision bound to interfere and set a conviction aside? In *The King v. Governor of Brixton Prison; Ex parte Servini*,¹⁸ a Magistrate erroneously took judicial notice of an Order in Council. On the hearing of an application to the King's Bench Division for a writ of habeas corpus an affidavit was put in stating that the Magistrate and other Magistrates at the same Court were constantly dealing with and were familiar with the Order in Council in question, and the writ was refused. In Mews' Digest, Vol. 21, p. 430, certain Scotch cases are cited in which a similar point appears to have arisen in connexion with orders made under the Defence of the Realm Regulations, 1915. This is an aspect of the matter which as yet does not appear to have been considered and

¹⁸. (1914) 1 K. B. 77 : 83 L. J. K. B. 212 : 109 L. T. 986.

which, I think myself, ought to be considered at some future date.

Sinha J. — I agree with my Lord the Chief Justice.

G.N.

Application dismissed.

[*Case No. 2.*]

A. I. R. (33) 1946 Patna 15

FAZL ALI C. J. AND IMAM J.

Syed Mohammad Yasin — Appellant
v.

Tara Mahton and others—Respondents.

Appeal No. 409 of 1943, Decided on 24th November 1944, from appellate decree of Sub-Judge, Patna, D/- 18th February 1943.

(a) Bihar Tenancy Act (8 of 1885), Ss. 112, 40, 40A — Compromise between landlord and tenant in proceedings under S. 40 — Revenue Officer held had jurisdiction to revise rent.

In 1933 there was a compromise between landlord and the tenants in a proceeding under S. 40, Bihar Tenancy Act. In 1934, a schedule was prepared by the Revenue Court showing the extent of the commuted rent with the direction that it would take effect from 1st September 1933. By a notification dated 19th June 1937, the Government of Bihar invested certain Revenue Officers with the power to settle rents, and when settling rents, to reduce rents under S. 112. Accordingly a reduction of rent under S. 112 of the Act was made on ground of reduction of area of the holding :

Held that the Revenue Officers had jurisdiction to reduce the rent. [P 18 C 2]

Held further that although the compromise may have been the basis as to the extent of the commutation, the order commuting the rent was one made under S. 40 of the Act. [P 18 C 2]

(b) Bihar Tenancy Act (8 of 1885), Ss. 112, 40 — Provincial Government can invest Revenue Officer to settle rents though commuted under S. 40.

In the interests of public order or of the local welfare the Provincial Government has the authority to invest a Revenue Officer with the power to settle all rents without exception, including even rents which have been commuted under S. 40.

[P 18 C 1]

(c) Bihar Tenancy Act (8 of 1885), Ss. 40, 40A and 112 — Revision of rent without notice to parties is not without jurisdiction.

Where the Settlement Officer revises the rent settled by the Assistant Settlement Officer without giving an opportunity to the parties to appear and be heard, it would at best be a case of exercising jurisdiction illegally and not a case of acting without jurisdiction : ('40) 27 A. I. R. 1940 Pat. 406 and ('41) 28 A. I. R. 1941 Pat. 390, *Rel. on.*

[P 18 C 2]

Nawal Kishore Prasad (No. 1), C. P. Sinha and S. M. Saleem — for Appellant.

Girishnandan Sahay Sinha — for Respondents.

Imam J. — In this appeal the plaintiff is the appellant. He brought a suit asking for a declaration that the reduction of rent allowed by the Revenue Officers under S. 112,

Bihar Tenancy Act, in respect of the holding recorded in khata Nos. 14, 18 and 21 of village Shaikhapur Narsanda was illegal and not binding on him. By a notification dated 19th June 1937, the Government of Bihar invested certain Revenue Officers with the power to settle rents, and, when settling rents, to reduce rents under S. 112, Bihar Tenancy Act, (hereafter called the Act). On a petition filed by the respondents, a reduction of rent under S. 112 of the Act was made by the Assistant Settlement Officer, reducing the rent by 25 per cent. It appears that, subsequently, the Settlement Officer further reduced the rent by six annas in the rupee. The Munsif dismissed the suit with reference to the order of reduction by 25 per cent. but decreed it with respect to the order of reduction by six annas in the rupee. The Subordinate Judge in appeal reversed the decision of the Munsif and dismissed the suit entirely, allowing the cross objection of the respondents against the decision of the Munsif decreeing the suit with respect to the order of reduction of rent by six annas in the rupee.

In order to appreciate the argument made on behalf of the appellant, it is necessary to state some further facts. It appears that on 7th February 1933, there was a compromise between the appellant and the respondents in a proceeding under S. 40 of the Act. On 22nd May 1934, a schedule was prepared by the revenue Court showing the extent of the commuted rent with the direction that it would take effect from 1st September 1933. It was pointed out that S. 40A of the Act directs that where the rent of a holding has been commuted under S. 40, it shall not be reduced for 15 years save on the ground of alteration of the area of the holding or under cls. (b), (c) or (e) of sub-s. (1) of S. 112A. Before the Bihar Tenancy (Amendment) Act 1937 (Bihar Act 8 of 1937), the words "or on the ground specified in cl. (a) of sub-s. (1) of S. 38" appeared in S. 40A of the Act instead of the words "or under cls. (b), (c) or (e) of sub-s. (1) of S. 112A." It was urged that S. 40A of the Act expressly prohibited reduction of rent which had been commuted under S. 40 before the expiry of 15 years from the date on which the order commuting the rent was to take effect except on the grounds mentioned in that section. Mr. Nawal Kishore Prasad No. 1 appearing for the appellant submitted that the reduction of rent in this case had not been made on the ground of alteration in the area of the holding. Indeed, that appears to be the ad-

mitted position. He urged that the only other ground on which there could be a reduction of rent within 15 years was under cls. (b), (c) or (e) of sub-s. (1) of S. 112A. Section 40A however, does not provide for reduction of rent under S. 112 as one of the grounds on which reduction could be made within 15 years. As the Revenue Officers had reduced the rent under S. 112 and not under S. 112A, such a reduction was made without jurisdiction. The learned advocate for the appellant contended that this was not a case of improper exercise of jurisdiction but one of want of jurisdiction. He further pointed out that in June 1937, S. 112A formed no part of the Act whereas cl. (a) of sub-s. (1) of S. 38 did. In short, his argument comes to this that in view of the provisions of S. 40A prohibiting reduction of rent commuted under S. 40 within 15 years except under the conditions mentioned therein, the Revenue Officers had no jurisdiction to reduce the rent under S. 112 of the Act. On behalf of the appellants it was also submitted that in any event the Settlement Officer had no jurisdiction to further reduce the rent to the extent of 6 annas in the rupee when the appellant had withdrawn his objection before him to the reduction made by the Assistant Settlement Officer. It was further contended on behalf of the appellant that, even assuming that rent could be reduced under S. 112 of the Act, the notification dated 19th June 1937, of the Government of Bihar published in the Bihar Gazette really directed reduction of rent which had been fixed between the years 1920 and 1932. As the rent in this case had been commuted in 1933 the Revenue Officers had no jurisdiction to reduce the rent which had been commuted after 1932. The learned advocate for the appellant laid emphasis on para. 1 of the notification which reads thus:

"Whereas it appears to the Government of Bihar that between 1920 and 1932 in fixing or enhancing money rents and in commuting produce rents in the district of Patna regard was had to the exceptionally high prices of staple food crops which prevailed in and about that period, and that in view of the present exceptionally low level of prices, the rents so fixed may now be unfair and inequitable and whereas the Government of Bihar is satisfied that in the interests of the local welfare it is necessary to exercise the powers conferred on it by S. 112, Bihar Tenancy Act."

Mr. Nawal Kishore Prasad No. 1 reads these words to mean that it was only the rents fixed between the years 1920 and 1932 which were authorised by the Government of Bihar to be reduced. He laid particular emphasis on the words, "the rents so fixed

may now be unfair and inequitable." These words according to him meant that it was only the rents fixed between the years 1920 and 1932 that were directed to be settled and, if necessary, be reduced. The learned advocate for the respondents contended that the Revenue Officers acted with jurisdiction, and, if in any way they acted improperly in the exercise of their jurisdiction, it was beyond the competence of the Civil Courts to give a declaratory decree of the kind asked for by the plaintiff. He pointed out that the notification of the Bihar Government dated 19th June 1937, did confer on the Revenue Officers concerned the power to settle all rents and, when settling rents, to reduce them if, in their opinion, the maintenance of the existing rents would be unfair and inequitable. He urged that S. 112 of the Act was a general provision, uncontrolled by S. 40A, conferring authority upon the Provincial Government to invest Revenue Officers with the power to settle all rents and reduce them if they were unfair or inequitable. He pointed out that sub-s. (2A) of S. 112 of the Act directs that a settlement of rents under that section shall be made in the manner provided by ss. 104 to 104J (both inclusive) of the Act. He drew our attention to the proviso to S. 104A which reads as follows :

"Provided that, in making any such settlement, regard shall be had to the principles laid down in Ss. 6 to 9 (both inclusive), 27 to 36 (both inclusive), 39, 43, 50 to 52 (both inclusive), cls. (b), (c) and (d) of sub-s. (1) of S. 112A, S. 180 and S. 191."

Sub-section (2A) of S. 112 and the proviso to S. 104A read together clearly indicate that a Revenue Officer, vested with the powers under S. 112, could reduce the rent which had been commuted under S. 40. Clause (b) of sub-s. (1) of S. 112A, specifically authorised reduction of rents commuted under S. 40 or by agreement between the tenant and the landlord of such holding. It was also urged in the alternative, on behalf of the respondents that, as the rent in this case had been commuted according to compromise arrived at between the landlord and the tenant, it could not be said that such a commutation was one under S. 40 of the Act. Accordingly, the provisions of S. 40A were inapplicable to the case. Therefore, even if S. 40A should at all be read as controlling S. 112, it was irrelevant for the purposes of this case. As for further reduction of rent to the extent of 6 annas in the rupee by the Settlement Officer, it was pointed out that under S. 104E, sub-s. (2), the Revenue Officer could, on his own motion, revise any rent, entered in a Settlement Rent-roll before it was sub-

mitted to the confirming authority under S. 104F.

The learned advocate for the respondents contended that the notification dated 19th June 1937 of the Government of Bihar under S. 112 of the Act did not limit the authority of the Revenue Officer concerned to the reduction of rents fixed between the years 1920 and 1932 only. There was a general authority conferred on the Revenue Officers concerned to settle all rents. I have given the respective submissions made before us on behalf of the parties as far as possible in detail. It is obvious that the meaning of the notification of the Government of Bihar dated 19th June 1937, under S. 112 of the Act should be construed in the first instance before dealing with the other aspects of the arguments made before us. In my opinion, para. 1 of the notification of the Government of Bihar dated 19th June 1937 merely declared the reasons which caused the Government to invest certain Revenue Officers with the power to settle rents under S. 112 of the Act. The words "so fixed" undoubtedly refer to the period between the years 1920 and 1932; but the latter parts of para. 1 gives another reason why the Government of Bihar decided to invest certain Revenue Officers with the power to settle rents under S. 112. The words,

"and whereas the Government of Bihar is satisfied that in the interests of the local welfare it is necessary to exercise the powers conferred on it by S. 112, Bihar Tenancy Act"

clearly indicate that independent of all considerations regarding fixing, enhancing or commuting of rents between the years 1920 and 1932, the Government of Bihar felt satisfied that in the interests of the local welfare action should be taken under S. 112 of the Act to settle rents. This construction of para. 1 of the notification is justified, in my opinion, by the concluding portion of what may be called the directory part of the notification. The notification after having declared the reasons for action under S. 112 and after having named certain Revenue Officers who were invested with the power to settle rents states that they may, when settling rents, reduce them in the

"cases of money rents of occupancy raiyats now payable or being paid which became payable or commenced to be paid on or after 1st day of January 1920 and on or before 31st day of December 1933."

This contention, on behalf the appellant, therefore, must be negatived. Section 40A of the Act undoubtedly prohibits reduction within 15 years from the date on which the

order commuting rent under S. 40 takes effect save on the ground of an alteration of the area of the holding or under cls. (b), (c) or (e) of sub-s. (1) of S. 112A. Does this mean that there can be no reduction of rent within 15 years under S. 112? If it be held that S. 40A overrides the provisions of S. 112 then there is much to be said for the contention that the Revenue Officers concerned had no jurisdiction to reduce the rent. I am, however, inclined to take the view that S. 112 is quite independent of S. 40A. I think that S. 40A intended to prohibit further reduction of rent within 15 years at the instance of the tenant just as much as it intended to prohibit enhancement of the rent within 15 years at the instance of the landlord when rent had been commuted under S. 40, except under certain conditions.

On the other hand, Section 112 is to be found in chapter 10 which deals with record of rights and settlement of rents. This chapter deals generally with matters concerning record of rights and settlement of rents and is self-contained. Section 113 (which is in Chap. 10) even prohibits enhancement or reduction of rent once settled under this chapter before the expiry of a certain period except under the circumstances mentioned therein. In the matter of settlement of rents under this chapter, the Provincial Government was authorised by S. 112 in the interests of public order or of the local welfare to invest a Revenue Officer with the power to settle all rents and when settling rents to reduce them if, in his opinion, they were unfair or inequitable. Interest of public order or of local welfare is the foundation for the exercise of the Provincial Government's authority to invest a Revenue Officer with such power. If S. 40A were to be read as overriding the provisions of S. 112 then although it may have become necessary in the interests of public order or of the local welfare to settle all rents, the Provincial Government would be powerless to render relief in the interest of public good. To read S. 40A in this manner would be to destroy the very purpose of S. 112. I think a fair reading of S. 112 must be that if it became necessary in the interests of public order or of the local welfare the Provincial Government had the authority to invest a Revenue Officer with the power to settle all rents without exception. The power which is vested in a Revenue Officer by S. 112 is not merely to settle 'rents' but to settle 'all rents' and the expression 'all rents', I think, must be interpreted to in-

clude even rents which have been commuted under S. 40. Sub-section (2a) of S. 112 provides that a settlement of rents under S. 112 shall be made in the manner provided by Ss. 104 to 104J (both inclusive.) The proviso to S. 104A enjoins that in making any such settlement, regard shall be had to the principles laid down in various sections of the Act including cls. (b), (c) and (d) of sub-s. (1) of S. 112A. Clause (b) of sub-s. (1) of S. 112A permits the reduction of rent of any occupancy holding which was commuted either under S. 40 or by agreement between the tenant and the landlord, between the 1st day of January 1911 and the 31st day of December 1936. I think, it must, therefore, be held that the Revenue Officers had jurisdiction to reduce the rent.

The contention on behalf of the respondents that the rent commuted in this case was not under S. 40 of the Act is invalid. Although the rent was reduced according to a compromise arrived at between the landlord and the tenants, the Revenue Officer drew up a schedule under S. 40 wherein it was specifically stated that it would take effect from 1st September 1933. The compromise may have been the basis as to the extent of the commutation but the order commuting the rent was one made under S. 40 of the Act. The further reduction by way of revision of the Settlement Rent-rolls made by the Settlement Officer to the extent of 6 annas in the rupee could have been made by him on his own motion under S. 104E, sub-s. (2) of the Act. Even if the appellant had withdrawn his objection to the reduction of rent by the Assistant Settlement Officer, the Settlement Officer was not thereby prevented from dealing with the matter under S. 104E. The proviso to S. 104E, however, states that no revision of an entry in a Settlement Rent-roll shall be made until reasonable notice has been given to the parties concerned to appear and be heard in the matter. It has not been established to my satisfaction that this proviso was not complied with. Even assuming that the Settlement Officer revised the rent settled by the Assistant Settlement Officer without giving an opportunity to the parties to appear and be heard, it would at best be a case of exercising jurisdiction illegally and not a case of acting without jurisdiction. As was pointed out in the cases in 21 P.L.T. 246¹

1. (40) 27 A. I. R. 1940 Pat. 406 : 189 I. C. 739: 21 P. L. T. 246, Central Co-operative Bank Ltd., Barh v. Dasrath Pandey.

and 22 P. L. T. 374² a Court has jurisdiction to decide wrong as well as right and that there is a confusion between the existence of jurisdiction and the exercise of jurisdiction. A Civil Court, therefore, cannot in the circumstances of this case give a declaration that the reduction of rent to the extent of 6 annas in the rupee by the Settlement Officer was without jurisdiction. Having regard to the view which I take as to the scope of S. 112 of the Act, this appeal must be dismissed with costs.

Fazl Ali C. J. — I am also of the opinion that this appeal should be dismissed with costs. Section 40A, Bihar Tenancy Act, provides that where the rent of the holding has been commuted under S. 40, Bihar Tenancy Act, it shall not be reduced for 15 years save on the ground of alteration of the area of the holding or under cls. (b), (c) or (e) of sub-s. (1) of S. 112A. It is contended that as in the present case the rent has not been reduced under S. 112A, the order of the Revenue Officer reducing it is ultra vires. What appears to have happened in this case is that the rent was reduced under S. 104A which provides that in making settlement of rent under that section regard shall be had to the principles laid down in certain sections of the Bihar Tenancy Act and also to cls. (b), (c) and (d) of sub-s. (1) of S. 112A. If therefore the rent has been reduced according to the principles laid down under any of the specific clauses of S. 112A under which it is permissible to reduce rent under S. 40A, it is difficult to hold that the provisions of S. 40A have been violated. In my opinion the rent having been reduced according to the principles laid down in the clauses mentioned in S. 40A, there was substantial compliance with the requirements of that section and the order of the Revenue Officer cannot be said to be without jurisdiction.

R.K.

Appeal dismissed.

2. ('41) 28 A. I. R. 1941 Pat. 390 : 194 I. C. 99 : 22 P. L. T. 374, Sree Kant Lal v. Ajodhya Singh.

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[Case No. 3.]

A. I. R. (33) 1946 Patna 19

FAZL ALI C. J. AND MANOHAR LALL J.

Prandhan Das — Petitioner

v.

Patayet Saheb Promode Chandra Deb and others — Opposite Party.

Application in Privy Council Appeal No. 32 of 1943, Decided on 15th August 1945, for leave to appeal to His Majesty in Council from decree of High Court in First Appeal No. 11 of 1940.

(a) Civil P. C. (1908), S. 110 — Affirmance — What amounts to, illustrated.

Where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of persons trying to appeal to the Privy Council those persons must show that some substantial question of law is involved : ('21) 8 A. I. R. 1921 Cal. 81, ('43) 30 A. I. R. 1943 Mad. 67 and ('44) 31 A. I. R. 1944 Lah. 329 (F. B.), *Rel. on.* [P 20 C 1, 2]

(b) Civil P. C. (1908), S. 110 — Substantial question of law held not involved.

The question which was involved was whether the plaintiff, who is a stranger to the contract has the right to maintain the action :

Held that there was no substantial question of law involved in the case. [P 20 C 1, 2]

Dr. D. N. Mitter — for Petitioner.

P. R. Das — for Opposite Party.

Order. — This is an application for leave to appeal to His Majesty in Council from the decree of this Court in First Appeal No. 11 of 1940. The facts of the case are somewhat complicated, but for the purpose of dealing with the present petition they may be summarised as follows : On the death of Raja Lakshmi Narayan, who was the proprietor of Balarampur estate, four persons claimed to succeed to the estate, these being, (1) Rani Labanyabati mother of Lakshmi Narayan who will hereinafter be referred to as the Rani, (2) Gajadhar, (3) Raghunath and (4) Radha Mohan. The petitioner before us supplied funds to Raghunath and at a later stage to Gajadhar for the purpose of carrying on the litigation relating to the right of the various claimants to succeed to the estate. Ultimately a compromise was arrived at between the Rani and Gajadhar, one of the terms of which was that a sum of Rs. 50,000 shall be payable to the petitioner and this sum shall be a charge on the Quilla Balarampur property. The petitioner, though he was not directly a party to the compromise, tried to enforce it by means of a suit against the defendants who included (1) the Rani (defendant 1), (2) a person to whom the Rani mortgaged the estate after the compromise (defendant 2) and (3) another person who was adopted as a son by the Rani after the compromise (defendant 3).

The trial Court held that the petitioner being not a party to the contract could not enforce it and upon this view dismissed the suit. The petitioner then appealed to this Court and, while the appeal was still pending, a compromise was arrived at between the petitioner and the Rani. The Rani admitted the plaintiff's claim for Rs. 50,000 and agreed that this sum shall be a charge

on the Balarampur estate. This compromise was recorded by the Court and a decree was passed in accordance with the compromise against the Rani. The petitioner contends that he is entitled to appeal from this decree as a matter of right because by reason of the compromise having been recorded the decree of this Court is not one of affirmance, and the value of the subject-matter of the appeal as well as of the suit is more than Rs. 10,000. On the other hand, it is contended on behalf of the opposite party that the decree of the Court below has been substantially affirmed and the petitioner cannot take advantage of that part of the decree which is based upon the compromise and against which he is not appealing. In A.I.R. 1921 Cal. 81¹ it was held that where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of persons trying to appeal to the Privy Council, those persons must show that some substantial question of law is involved. A similar view was taken in A. I. R. 1943 Mad. 67² and A. I. R. 1944 Lah. 329.³ In the last mentioned case Din Mohammad J. summed up his view as to the result of the variation of the decree of the first Court by consent of parties in these words :

"Here, as already explained, the respondents had of their own accord withdrawn their relief in respect of accounts and consequently any variation that followed in the decree of this Court was not the result of an adjudication by this Court but of the parties' own action. It was as if that part of the case had been entirely removed from the adjudication of this Court and consequently it ceased to have any concern with it whatever. The applicant urges that what is to be looked at is only the final result and not the means by which it has been achieved. I, however, do not agree. So far as this Court had occasion to deal with the matter in controversy before it, the decree of the Court below had been affirmed and any variation that was introduced in it was merely because the parties had themselves so willed. The decree of this Court was therefore to all intents and purposes a decree of affirmance within the meaning of S. 110, Civil P. C."

I am inclined to agree with the view set out in these decisions and to hold that the decree against which the petitioner seeks to appeal is one of affirmance. The next question is whether the appeal involves a substantial point of law. The question which is

admittedly involved in this litigation is formulated in the judgment of the High Court in these words: "Whether the plaintiff, who is a stranger to the contract has the right to maintain the action."

It is contended by Dr. Mitter, who appears for the petitioner that the question is a very serious one and ought to be settled by the Privy Council. It has, however, been shown in the judgment of the High Court that the balance of authority is in favour of the view that a plaintiff who is a stranger to the contract cannot maintain an action to enforce the contract. This question was very fully dealt with by Rankin C. J. in 55 Cal. 1315⁴ and he has summed up his conclusion in these words :

"In my judgment it is erroneous on the basis of that case (*Khwaja Muhammad Khan v. Husaini Begum*⁵) or on the observations of Jenkins C. J. in 41 Cal. 137⁶ to suppose that in India persons who are not parties to a contract can be admitted to sue thereon, except where there is an obligation in equity amounting to a trust arising out of the contract. I say nothing as to whether special rules of law may be applicable to communities among whom marriages are contracted for minors by parents and guardians. But putting aside such cases, I see no reason to think that the law in India contains a series of exceptions to the principle that a contract can only be sued upon as such by a party thereto."

This view has been affirmed by the Privy Council in several cases and has been adopted in this Court. The case in 37 I. A. 152⁵ upon which Dr. Mitter relies is distinguishable and cannot be made applicable to this case. In our opinion there is no substantial question of law involved in this case and we must accordingly dismiss this application with costs. Hearing fee is assessed at three gold mohurs.

R.K. *Application dismissed.*

4 ('28) 15 A. I. R. 1928 Cal. 518 : 55 Cal. 1315 : 114 I. C. 658, Krishna Lal Sadhu v. Pramila Bala Dasi.

5. ('10) 32 All. 410 : 37 I. A. 152 : 7 I. C. 237 (P. C).

6. ('14) 1 A. I. R. 1914 Cal. 129 : 41 Cal. 137 : 20 I. C. 630, Debnarayan Dutt v. Chunilal Ghose.

[Case No. 4.]

A. I. R. (33) 1946 Patna 20

VARMA AND SHEARER JJ.

Chhotan Lal and another — Petitioners
v.

Emperor.

Criminal Revn. Nos. 226 and 227 of 1945, Decided on 16th March 1945, against order of Sess. Judge, Purulia, D/- 20th January 1945.

Defence of India Rules (1939), R. 81 (4) — Charge for contravening Bihar Essential Foodgrains (Possession and Storage) Order,

1. ('21) 8 A.I.R. 1921 Cal. 81 : 66 I. C. 621, Uma Churn v. Kanai Lal.

2. ('43) 30 A. I. R. 1943 Mad. 67 : 208 I. C. 65, Karunalaya Valangupalli v. Rev. Father Pignot.

3. ('44) 31 A. I. R. 1944 Lah. 329 : 216 I. C. 33 (F. B.), Brahma Nand v. Shree Sanatan Dharma Sabha.

1943 — Accused not proved to be occupier of room where grain was stored — Conviction under charge as framed cannot be sustained.

Where a person, charged as an occupier for the contravention of the Bihar Essential Foodgrains (Possession and Storage) Order, 1943, is found merely to have been engaged in getting and storing the foodgrain in one of the rooms of a building but is not shown to be the occupier of that room, he cannot be convicted of the charge as framed.

[P 22 C 1]

S. N. Sahay and S. K. Mazumdar —
for Petitioners.

H. R. Kazimi for Government-Advocate —
for the Crown.

Varma J. — The petitioners, Chhotan Lal and Gulzari Lal Marwari, have been convicted under R. 81 (4) of the Defence of India Rules and sentenced to four months' rigorous imprisonment each. The case for the prosecution is that on 31st May 1944 at 11 P. M. the Sub-Inspector, B. N. Chatterji, with a junior Sub-Inspector (P. W. 2) along with certain other officers visited the *dhaura* in Kenduadih on getting some information that the petitioners had brought a goods-truck with a view to smuggle dal to Bengal from the house of Maksudan Singh, who has been acquitted by the appellate Court. When they went to the place, they saw a military truck loaded with food stuffs, and sitting on that truck were these two petitioners. Seeing the police party they fled but the police succeeded in catching Chhotan. The *dhaura*, which is said to belong to Maksudan, who was a co-accused, was found to contain 79 bags of masoor dal, each bag weighing about 2½ maunds. The case for the prosecution further is that out of these 79 bags about 50 bags were brought by Gulzari and Chhotan from the shop of one Rachhpal Marwari in Jharia and they have no licence for storing or hoarding dal. The charge against the present petitioners as well as Maksudan was as follows:

"That you, on or about 31st day of May 1944 at Kenduadih without being a licensed dealer under Foodgrains Control Order of 1942 and without any authority from District Magistrate, Dhanbad, kept 79 bags of masoor dal in the premises in the occupation of Maksudan Singh and contravened the Bihar Essential Foodgrains (Possession and Storage) Order, 1943, published in the Notification No. 12726—P. C. dated 17th September 1943 and thereby committed an offence punishable under R. 81 (4) of the Defence of India Rules and within my cognizance."

The case for the defence as it appears from their statement under S. 342, Criminal P. C., was that they were not guilty, and there was only one suggestion in the course of cross-examination that Gulzari was implicated because he happened to be a nephew of one Phulchand. The fact that 79 bags of

masoor dal were recovered from one of the rooms of the *dhaura* is not denied, and it is also admitted that neither the petitioners nor Maksudan had any licence as contemplated by the Notification. The learned Judge formulated the questions to be decided in this case as follows:

"The simple question that has to be decided in this case is whether the appellants stored these bags of masoor dal or not. In the case of Maksudan, however, a further question will arise whether one of the rooms in the *dhaura* from where the dal was recovered was in possession of appellant Maksudan."

Having formulated these questions the learned Judge went into the question as to how far the petitioners, Gulzari and Chhotan, had a hand in the various transactions beginning from the purchase till the dal was stored in the room from where it was recovered, because the learned Judge has referred to the fact that these people were responsible for the transport of the dal from the place where it was purchased. Now, the finding of the learned Judge, after referring to certain circumstances is as follows:

"This taken with the fact that Gulzari was sitting on the truck near the *dhaura* and that he ran away when chased by the police is a circumstance to support the prosecution case that Gulzari had a hand in the purchase of the dal from this firm."

There is another finding, after referring to the evidence of the cartmen, which is as follows:

"These circumstances can leave no manner of doubt that Gulzari certainly was storing these bags of masoor dal and since he had no licence to do so there can be no doubt that he had committed the offence with which he has been charged."

Chhotan's name, of course, does not appear in the first information report; but the learned Judge is satisfied that so far as Chhotan was concerned the charge was proved against him also. Then, after dealing with the case of Maksudan he acquitted Maksudan. I have quoted the charge above to show that the trial was for the contravention of the Notification referred to in that charge. The relevant paragraph of the Notification is as follows:

"No person other than a producer of any essential foodgrain or a dealer licensed under the Foodgrains Control Order, 1942, shall keep or store in any premises occupied by him, or permit any other person to keep or store in any such premises, a total quantity of essential foodgrains exceeding 25 standard maunds unless he has obtained a written permit from the District Magistrate of the district in which he resides authorising him to do so. Every such permit shall specify the quantity of the essential commodity which may be kept or stored in excess of the permissible maximum."

Explanation. — For the purposes of this paragraph the members of a family shall be deemed to be one person."

In dealing with the case of these petitioners, although the learned Judge has carefully analysed the evidence that was led in the case, he has not focussed his attention upon that part of the paragraph of the Notification, which says,

"shall keep or store in any premises occupied by him, or permit any other person to keep or store in any such premises."

The findings which the learned Judge arrived at go to show only that the petitioners were engaged in getting and storing the dal in one of the rooms of the *dhaura*. Whether they were the occupiers of the room where the dal was found has not been considered by the learned Judge, and on the charge as framed, it is the occupier of the premises who is held responsible under the Notification. In the judgment of the learned Judge there is no finding that the petitioners were the occupiers of the room. Mr. H. R. Kazimi, appearing on behalf of the Crown, has pointed out that if the room was empty and the petitioners have been found to have been the persons responsible for the depositing of these bags of masoor dal in that empty room, then the petitioners should be held to be the occupiers of that room. This would have been a good argument in support of the prosecution if the charge had been different. The person who has been mentioned as the occupier of the premises is Maksudan Singh and the trial itself was conducted on the basis that the premises were occupied by Maksudan Singh, and he has been acquitted by the appellate Court. The petitioners, therefore, may be guilty of some other offence, but on the charge as framed, I am afraid the charge has not been established. Their convictions and sentences must, therefore, be set aside.

Shearer J. — I agree to the order proposed. In law the petitioners cannot, possibly, be said to have been the occupiers of the premises. It may be that, in taking the grain to these premises, they did an act preparatory to a contravention of the Order, and are liable to punishment under R. 121 of the Defence of India Rules; but they were not so charged and the point is not so clear that the conviction can now be altered in revision.

R.K./V.S.

Convictions set aside.

[*Case No. 5.*]

A. I. R. (33) 1946 Patna 22

SINHA AND PANDE JJ.

Loknath Singh and others —

Defendants — Appellants

v.

*Chhotan Barhi, Plaintiff and another,
Defendant — Respondents.*

Appeal No. 282 of 1944, Decided on 23rd April 1945, from appellate decree of Addl. Sub-Judge, Patna, D/- 22nd December 1943.

Bihar Tenancy Act (8 [VIII] of 1885) — Lease of agricultural land can be created orally — *Kabuliyat* by tenant registered — Rent accepted by landlord — Valid lease is created.

There is no provision in the Bihar Tenancy Act which defines a lease or prescribes the mode for the creation of an agricultural lease. Therefore the long standing practice to treat a *kabuliyat*, executed by the lessee and accepted by the lessor, as the instrument creating a tenancy has not in any way been affected by the Transfer of Property Act. An agricultural lease may be made orally, and if the subsequent acts and conduct of the parties disclose that the lease so created was acted upon, the lease is a valid lease in law. If the terms of settlement mutually agreed upon between the landlord and tenant are embodied in a *kabuliyat* executed by the lessee and registered in accordance with the provision of S. 17 (1) (d), Registration Act, and the *kabuliyat* is accepted by the landlord in the sense of acceptance of rent and grant of receipts to the tenants in acknowledgment of payment of rent, a valid agricultural lease is constituted in law: ('24) 11 A.I.R. 1924 Pat. 641 and ('32) 19 A. I. R. 1932 Cal. 715, *Rel. on*; ('35) 22 A. I. R. 1935 Pat. 291 (F.B.), *Disting.* [P 24 C 1, 2]

L. K. Jha, S. P. Sinha and Ramdeo Sinha —
for Appellants.

Shambhu Barmeshwar Prasad —
for Respondents.

Pande J. — This is an appeal by defendants first party against the decree dated 22nd December 1943 of the Additional Subordinate Judge, second Court, Patna, which affirmed the decree dated 22nd February 1943 of the Munsif of Barh. The dispute related to 2.17 acres land bearing survey plot No. 178, khata No. 590, in mouza Paighambarpur Sahri, touzi No. 5963. Mathura Das, defendant second party, is the 16 annas proprietor of the mouza. There was a proceeding under S. 144, Criminal P. C., on a trouble between the plaintiff and the defendants first party regarding possession over the land. That proceeding terminated in a favourable order for the defendants first party. The plaintiff instituted the suit on the allegation that in consequence of the adverse order in the said proceeding the defendants first party dispossessed him from the land. The plaintiff asked for a declaration of title and recovery of possession. His

case was that the land was settled with him by the proprietor by an unregistered patta dated 31st October 1938, and he executed a registered kabuliyat in favour of the landlord on 1st November 1938 and from the date of settlement he had all along been in possession of the land until dispossession by the defendants first party on the strength of the order of the proceeding under S. 144, Criminal P. C. The defendants first party set up title to the land on the basis of a *sada Hukumnama* dated 3rd June 1920, said to have been granted to them by one Ram Parsad, *mokhtar-am* of the proprietor. They asserted that from the date of settlement under the said *Hukumnama* they have all along been in possession of the land. Both the Courts found that the pattas and kabuliyats were genuine documents of bona fide transactions of settlement of the land with the plaintiff who had all along been in possession of the land from the time of the settlement until dispossession in consequence of an adverse order in the proceeding under S. 144, Criminal P. C. The Courts further found that the *Hukumnama* relied upon by the defendant was a spurious document and that the defendant was not in possession of the land before. The contest between the parties is concluded by the above concurrent findings of fact of the Courts below.

It has been urged that in an action for ejectment the plaintiff, in order to succeed, must establish valid title to the property to evict the person in possession of it. It is said that in the present case the plaintiff bases his case of settlement of the land on an unregistered patta, which being a lease of an immovable property requires registration under the provision of S. 17, Registration Act, 1908. And S. 49 of the Act provides that no document required by S. 17 to be registered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property. Therefore, the plaintiff did not acquire any valid title to the land. In support of this contention reference is made to the decision in 3 Pat. 349¹ and 18 P. L. T. 1012.² The latter case followed the former. The former case is an authority for the proposition that an agricultural lease which has been reduced to writing requires to be registered under S. 17, Registration Act, 1908, and if the document is not registered it can-

not under S. 49 be received in evidence of the lease, and in such a case S. 91, Evidence Act, debars other evidence of the lease being given. But in the same case his Lordship Dawson-Miller C. J. with whom Mullick J. agreed further laid down :

"If the subsequent acts of the parties themselves disclose a state of affairs consistent only with the existence of an agreement mutually recognized and acted upon as if the instrument were binding, then, although the written document may be defective as a valid and finally concluded agreement such defects may be supplied by the subsequent actings and conduct of the parties."

In that case the question for determination was the status of the respondent in regard to seven bighas land. In the record of rights he was recorded as a tenant at a fixed rent, while the appellant (landlord) contended that he was an occupancy raiyat of the land. The respondent relied upon a sanad dated 1882. Their Lordships held that the document was not a valid instrument in proof of finally concluded agreement, nevertheless it was admissible for a collateral purpose, e. g., to show the nature of the defendant's possession. It was pointed out that an agricultural lease of an immovable property need not be in writing :

"It may be effected by oral agreement in which case no question of registration arises and the lease may be proved in the same way as any other verbal agreement, and even documentary evidence may be admissible in support of the oral agreement."

It was found that the document, sanad, was genuine and the respondent had been in possession of the land as a tenant at fixed rent and had been paying rent accordingly. On these materials it was held that the defendants' status to the land as tenants at fixed rent had been established. The present case is much stronger. Here the plaintiff no doubt claims settlement of the land on the basis of an unregistered patta, but it was followed by a registered kabuliyat which was executed on the very next day. The kabuliyat embodies all the terms of settlement mutually agreed between the parties. This kabuliyat was accepted by the proprietor. In proof of its acceptance the respondent produced two receipts, Exs. 7 and 7 (a) for the years 1347 and 1348 and corresponding counterfoil from the landlord *sarishta* and also examined the landlord who supported the plaintiff's story of settlement and possession over the land. The above documents were found by both the Courts to be genuine. The Courts also found that the plaintiff had been in possession of the land until dispossessed. Thus, on the authority of the very

1. ('24) 11 A. I. R. 1924 Pat. 641 : 3 Pat. 349 : 79 I. C. 26, Janki Kuer v. Birj Bhikhan Ojha.

2. ('37) 18 P. L. T. 1012, Ramautar Singh v. Juthi Patna.

case relied upon by the appellants, the respondents' title to the land by virtue of the settlement is well established in law.

It has long been the common practice in this country, where no patta is ordinarily executed, to treat a kabuliyat, accepted by the lessor, as the instrument creating a tenancy, and there is no question that before the passing of the Transfer of Property Act a lease could be affected by an instrument signed by the lessee only and registered in cases where registration was compulsory: 21 M. L. J. 202,³ 14 C. L. J. 614;⁴ 39 Cal. 1016,⁵ and 55 Cal. 435.⁶ These cases further held that a registered kabuliyat signed by the lessee and accepted by the lessor is sufficient to constitute a lease within the meaning of s. 107, T. P. Act. A Full Bench of this Court in 14 Pat. 672⁷ dissented from this view. In this case it was held that s. 107 read with s. 105 of the Act clearly implies that the registered instrument must be executed by the lessor who is the transferor and as such registered kabuliyat executed by a lessee in favour of the lessor and accepted by the latter either orally or by means of an unregistered document does not constitute a lease under s. 107, T. P. Act, 1882. This was a case of lease of three villages to which the Transfer of Property Act applied. But the present case is one of agricultural lease to which the Transfer of Property Act has no application. Section 117 of the Act clearly provides that none of the provisions of Chap. 5 (which includes ss. 105 and 107) apply to leases for agricultural purposes. Khaja Mohammad Noor J., one of the Judges of the Full Bench, in his judgment stated:

"Agricultural leases are also not affected by the point raised before us, inasmuch as they are not governed by the Transfer of Property Act."

Therefore, the Full Bench decision does not, in my opinion, in any way affect the authority of the cases cited above in regard to agricultural leases. The present lease being an agricultural lease is governed by the Bihar Tenancy Act. There is no provision in the Act which defines a lease or prescribes

the mode for the creation of an agricultural lease. Therefore the long standing practice prevailing in this country to treat a kabuliyat, executed by the lessee and accepted by the lessor, as the instrument creating a tenancy has not in any way been affected by the Transfer of Property Act. An agricultural lease may be made orally, and if the subsequent acts and conduct of the parties disclose that the lease so created was acted upon, the lease is a valid lease in law: 3 Pat. 349;¹ 55 C. L. J. 312.⁸ If the terms of settlement mutually agreed upon between the landlord and tenant are embodied in a kabuliyat, executed by the lessee and registered in accordance with the provision of s. 17 (1) (d), Registration Act, is accepted by the landlord in the sense of acceptance of rent and grant of receipts to the tenants in acknowledgment of payment of rent, a valid agricultural lease is constituted in law. Therefore the contention of the learned advocate for the appellants is not sustainable. The appeal must fail. I would, accordingly, dismiss the appeal with cost.

Sinha J.—I agree.

R.K.

Appeal dismissed.

8. ('32) 19 A. I. R. 1932 Cal. 715 : 142 I. C. 81 : 55 C. L. J. 312, Giribala Dasi v. Dwarka Nath.

[Case No. 6.]

A. I. R. (33) 1946 Patna 24

CHATTERJI AND PANDE JJ.

Babu Lal Singh and another—Defendants—Appellants

v.

Baijnath Singh and another—Plaintiffs—Respondents.

Appeal from original order No. 99 of 1943, Decided on 26th March 1945.

(a) Will—Revocation—Destruction—Presumption as to destruction by testator when arises.

Where the essential condition of the rule of English law "if a will traced to the possession of the deceased and last seen there is not forthcoming on his death" has not been established, the presumption of law that it is destroyed by the testator himself does not apply: 1900 A.C. 604 and (1836) 1 Moo. P. C. 299, *Ref.* [P 26 C 1]

(b) Will—Proof of—Original will not forthcoming—Both parties failing to prove its destruction—No change of intentions proved—Will is lost or mislaid but not revoked and certified copy is admissible.

Where both parties have failed to prove their respective allegations regarding destruction of the will and the original will is not forthcoming, then the document is either lost or mislaid unless revoked; and if there is nothing to show any change of intention, which was likely to lead to

3. ('12) 35 Mad. 95 : 8 I. C. 668 : 21 M. L. J. 202 (F.B.), Ajam Sahib v. Madura Sree Meenatchi Sundareswarar Devastanam.

4. ('11) 10 I. C. 489 : 14 C. L. J. 614, Akram Ali v. Durga Prasanna Roy.

5. ('12) 39 Cal. 1016 : 14 I. C. 540, Raimoni Dassi v. Mathura Mohan.

6. ('28) 15 A. I. R. 1928 Cal. 392 : 55 Cal. 435 : 110 I. C. 368, Dinanath Kundu v. Janki Nath.

7. ('35) 22 A. I. R. 1935 Pat. 291 : 14 Pat. 672 : 157 I.C. 98 (F.B.), Ramkrishna Jha v. Jainandan Jha.

the revocation of the will the only reasonable inference is that the document is either mislaid or lost. The loss of a will does not operate as a revocation and a certified copy of it is admissible.

[P 26 C 2; P 27 C 1, 2]

P. R. Das, A. B. N. Sinha, Prem Lall and D. N. Varma — for Appellants.

Mahabir Pd., Harians Kumar and Rai Indra Behari Saran — for Respondents.

Pande J. — This appeal is by the defendants from an order dated 2nd June 1943, of the District Judge of Shahabad. The respondents propounded the last will of one Manbodh Singh who died on 17th November 1935, at Benares. The will in question was said to have been executed and registered on 17th February 1934. A certified copy of the will obtained from the registration office was produced with the application for the grant of probate. The original will was said to have been destroyed along with the record of a criminal case in which it was said to have been filed. The appellants contended that Manbodh was physically and mentally incapable of executing the will; that he did not execute the alleged will and that a forged will that had been got up by the plaintiffs was revoked by Manbodh by destroying it. The lower Court found that the will was duly executed by Manbodh; that he was of sound disposing state of mind at the time and that the will was not revoked by Manbodh. Accordingly that Court granted letters of administration with a copy of the will annexed to the plaintiffs. The defendants have preferred this appeal. The relevant facts are: The testator and the parties to the proceedings giving rise to this appeal are descendants of one Sarbjit Singh who had four sons. Manbodh was descendant of Sarbjit Singh in the fourth degree by a son, Sita Ram Singh; the defendants are Sarbjit's descendants in the third degree by another son, Tirlok Singh, and the plaintiffs are descendants in the fifth degree by a third son, Naujadik Singh. The plaintiffs are related to Manbodh as nephews and the defendants as uncles, several degrees removed. Manbodh had no issue by his wife Mt. Talukraj Kuer. By the will (Ex. 7), the testator bequeathed his entire estate to his wife subject to the condition that she shall have no right to create any encumbrance on the properties or to transfer them. On the death of his wife the entire estate was to pass under the will to the plaintiffs Bhagwati Singh and Baijnath Singh. Manbodh's widow, Mt. Talukraj Kuer, came into possession of her husband's estate and remained as such till her death which

event took place on 17th December 1939. The application for the grant of probate was presented to the Court on 2nd February 1940.

The finding of the lower Court regarding due execution of the will by Manbodh has not been challenged in this Court. The only question that has been urged is that the testator revoked the will. Both parties' case is that the will was destroyed. The parties are at variance as to the circumstance of its destruction. The plaintiffs' case was that the will was produced in a criminal case in the year 1934 and it was destroyed there along with the record of the case in January 1936. The defendants' case was that when Manbodh came to know that a forged will had been got up he called for it and destroyed the document by throwing it in a burning hearth. The question is whether the will was destroyed by the deceased himself *animo revocandi* or whether it was destroyed without his privity or approbation. In the former case the paper is revoked, in the latter case a copy may be established. Mr. P. R. Das argued for the appellants that the plaintiffs' plea of production of the original will in a criminal case and its destruction by the Court for failure to take it back in time had not been established by satisfactory evidence. Therefore, the presumption of law is that it had been destroyed by the testator himself and the presumption should take effect unless it is repelled by the plaintiffs. In support of this submission reference is made to a decision of their Lordships of the Privy Council in 1900 A.C. 604.¹ In this case their Lordships quoted with approbation the principle of law laid down by Lord Wensleydale in 1 Moo. P. C. 299² "there is a presumption 'that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it.' Whether this should be called a presumption of law or fact does not seem material. It may, of course, be rebutted, and 'the presumption will be more or less strong according to the character of the custody which the testator had over the will'."

Mr. Das, referring to the provision of sub-s. (2) of S. 61 of the Registration Act, 1908, which provides that on completion of the registration the document shall be returned to the person who presented the same for registration or to such other person (if any) as he has nominated in writing in that be-

1. (1900) 1900 A. C. 604 : 69 L. J. P. C. 141, *Allan v. Morrison*.

2. (1836) 1 Moo. P. C. 299, *Welch v. Phillips*.

half on the receipt mentioned in S. 52, submitted that there is no case that the will after registration was made over to a nominee of Manbodh. Therefore, the ordinary presumption is that the document must have been taken back from the registration office by Manbodh himself and was in his custody. It is urged that as the plaintiff had failed to account for the absence of the will to the satisfaction of the Court, the presumption of law quoted above should take effect. But it is neither party's case either in the pleadings or in evidence that the will was "last seen" in the possession of the testator. Jagarnath Singh (P. W. 4) stated "I filed the will in that case. Manbodh had given it to me after it was registered." Ram Nagina Lal (D. W. 2) stated.

"Jagarnath gave a document to Manbodh who gave it to me . . . I read the document. Manbodh threw the document into the fire; the document was burnt."

On reading the certified copy of the will (Ex. 7) he stated that the document which was burnt was the original copy of that will. Two other witnesses for the defendants (D. Ws. 3 and 4) deposed to a similar effect. Mr. Das suggested that the testimonies of the witnesses of both the parties should be discarded as unsatisfactory and the case be decided on the basis of the presumption of law urged by him. But it is a well-established proposition of law that the decision of a case must rest on the pleadings and evidence. Therefore the suggestion of Mr. Das cannot be accepted. In my opinion the essential condition of the rule of English law "if a will traced to the possession of the deceased and last seen there is not forthcoming on his death" has not been established. Therefore the presumption of law on which Mr. Das laid much stress has no application to the facts of the present case.

The onus primarily lies on the party propounding the copy to account for the absence of the original. The evidence on the point is meagre. There is the oral testimony of a single witness, Jagarnath Singh, who deposed in support of the plaintiffs' plea of the circumstance in which the will is said to have been destroyed. He is obviously an interested witness. It seems improbable that the will, if produced in the criminal case, should have been left lying there for about 18 months when the record of the case was destroyed. I, therefore, agree with the lower Court that there is no satisfactory evidence to prove the alleged destruction of the document. The onus of proving destruction of

the will by the testator himself lay upon the defendants. Three witnesses were examined on behalf of the defendants in support of the plea of revocation of the will by the testator himself (D. Ws. 2, 3 and 4). The lower Court commented on the evidence of each of these witnesses and considered their testimony to be unreliable. I have carefully scanned the depositions of these witnesses and see no reason to differ from the learned District Judge's opinion before whom the witnesses were examined.

Reference is made to the *rehan* deed (Ex. C) executed by Mt. Talukraj Kuer on 17th November 1935. By this deed the Musammatt contracted loan by giving in mortgage certain properties. The deed recited that the loan was incurred for performing the funeral ceremony of Manbodh Singh. The will (Ex. 7) directed that the widow would have no right to encumber or to alienate the property and that Bhagwati Singh or Baijnath Singh should perform the funeral ceremonies and both contribute the expenses in equal shares. The document shows that the widow alienated the properties against the direction contained in the deed of will and incurred expenses for performing *sradh*. This document was attested by Jagarnath Singh, brother of Bhagwati Singh. It was argued that alienation of the property by the widow against the direction in the will and apparently to the knowledge of the legatees indicated that the will had been revoked by Manbodh. In my opinion, these circumstances do not positively indicate that Manbodh Singh had revoked the will. It is not unoften the case that directions in the will are not strictly followed by the legatees. Mr. Das referred to another circumstance as an indication of revocation of the will, and that is, the delay in presentation of the application for grant of probate of the will. The application was presented within two months of the death of Mt. Talukraj Kuer, who under the will had acquired absolute estate on the death of her husband and remained in possession till her death. Bhagwati and Baijnath did not derive any interest in the estate under the will till the death of the widow. This circumstance clearly explains the delay in the application for probate. No inference of revocation can be drawn from this circumstance.

It follows from the above discussion that it has not been proved that the will was destroyed by the testator himself. Now the position is that both parties have failed to prove their respective story regarding des-

struction of the will. It seems unlikely that the document so favourable to the plaintiffs should be suppressed by them. Therefore the document is either lost or mislaid unless revoked. In such circumstances the relevant question that arises is, whether the evidence leaves on the mind of the Court the conclusion that the testator continued in the same mind from the date of his will down to the time of his death. In other words, whether the evidence gives any reasonable indication of any change of testamentary intentions of the testator. In the present case there is ample evidence to show that the testator continued on good terms with the plaintiffs, while his relations with the defendants were rather strained. The will recites :

"Since long my near agnates Babu Bhagwati Singh and Baijnath Singh who are my nephews in relation have been living with me, the executant, in one and the same house and they always render service and remain obedient to me, the executant and my wife."

Manbodh along with the plaintiffs had instituted a suit against defendants and others for the partition of a small piece of land held by them jointly and on which stood their *dalan*. That plaint was filed on 2nd November 1933 (Ex. 16). Manbodh and Jagarnath, brother of one of the plaintiffs, had jointly granted a patta to one Loki Ahir regarding settlement of a certain land on 26th July 1933 (Ex. 5). On 8th May 1935, Manbodh stated in his deposition in the criminal case that the accused persons had requested him to cancel the will and to execute another will including them as legatees and on his refusal to do so they had assaulted him. On 18th September 1934, Manbodh with the plaintiffs and their brother Jagarnath Singh filed a petition in that partition suit for amendment of the plaint. This was after the disposal of the criminal case (Ex. A) and the alleged time of destruction of the will by Manbodh. On 20th September 1934, Manbodh wrote a postcard to Baijnath Singh, one of the plaintiffs who was then at Dibrugarh in Assam. The contents of the postcard show that Manbodh asked Baijnath to send him Rs. 100 and also informed him about the progress of the partition suit. On 9th February 1935, Manbodh Singh had written a postcard to Bhagwati Singh in which he informed him about certain monetary transactions and other family matters. The above facts clearly indicate that Manbodh and the plaintiffs continued to be on good terms at least till 9th February 1935. There is nothing to suggest that the cordial relation that existed between Manbodh and the plaintiffs was in

any way disturbed during the period that intervened between 9th February and 11th November 1935, when Manbodh died. The natural inference is that good relations between the testator and legatees continued till death. Mr. Das was not able to point out any circumstance indicating any change in the testamentary intentions of Manbodh after he had given his deposition in the criminal case in the month of May 1934. The learned counsel submitted that it was not unlikely that Manbodh sometime before his death might have realised his mistake of depriving his next of kin who were the legal heirs of their just claim to his estate and so destroyed the will. It is true that testamentary intentions are ambulatory. But there is nothing to show any change in Manbodh's testamentary intentions. Rather the evidence detailed above definitely rules out the possibility of such change. Thus there is nothing to show any change of intention, which was likely to lead to the revocation of the will. In the circumstances the only reasonable inference is that the document is either mislaid or lost. The loss of a will does not operate as a revocation. It has been established that the will was duly executed by Manbodh and there is no uncertainty about the contents of it as a certified copy of it has been produced. Therefore, in my opinion, the lower Court was right in granting letters of administration with copy of the will annexed. The appeal, therefore, must fail. Accordingly I would dismiss the appeal with cost.

Chatterji J. — I agree.

R.K./V.S.

Appeal dismissed.

[Case No. 7.]

A. I. R. (33) 1946 Patna 27

MANOHAR LALL AND DAS JJ.

Bhagaban Prusti and another —

Appellants

v.

Narayana Prusti — Respondent.

Appeal No. 27 of 1939, Decided on 27th April 1945 (Cuttack Circuit). from appellate decree of Dist. Judge, Cuttack, D/- 20th December 1938.

(a) Hindu law — Religious Endowment — Right of management — Transfer of, is void — Custom recognising such transfer is against public policy particularly when sale is to stranger for pecuniary benefit of vendor.

A sale by a shebait or mohant of his right to managedebottar property is void. Even if a custom be proved which sanctions the sale of such a right, the Courts should refuse to recognize it as being against public policy, specially where the sale is

made to a stranger for the pecuniary benefit of the vendor: 1 Mad. 235 (P.C.), *Rel. on.* [P 29 C 1]

(b) Hindu law — Religious Endowment — Joint family can acquire right of management through karta and members of the family can obtain declaration of their joint rights of management along with karta — Mode of management can be by turns.

The right to manage charities, without any beneficial interest in the charity properties can be vested in a joint Hindu family. In such a case, the senior male member of the family is, until a partition is effected, entitled to exercise the right of management vested in the family on its behalf: ('32) 19 A. I. R. 1932 Mad. 167, *Ref.* [P 29 C 2]

There is nothing in law which would prevent the manager of the family from acquiring the shebaiti right on behalf of the joint Hindu family. Whether he actually acquired the right on behalf of the joint family or not is primarily a question of fact. Where the karta has acquired such rights on behalf of the family the other members are entitled to a declaration that the shebaiti or marfatdari right belongs to the joint family, and that they have joint interest in such right along with the karta. There can be more than one shebait where the management can, without detriment to the trust, be held by turns, and in such a case it is open to the members of the family to agree to or for the Court to decree management by turns or in some settled order or sequence: 29 Mad. 283 (P. C.), *Ref.*; ('17) 4 A. I. R. 1917 P. C. 190, *Disting.* [P 29 C 2; P 30 C 1, 2]

(c) Hindu law — Partition — Management of religious endowment (*Quære.*)

Whether the right of management can be the subject of partition amongst the members of the joint family. [P 30 C 2]

B. K. Ray for B. Mahapatra—for Appellants.
S. P. Mohapatra—for Respondent.

Das J.—This is a second appeal by the plaintiffs, which arises out of a suit brought by them for a declaration that they are *co-shebaitis* and *co-marfatdars*, with the defendant, of four deities, Sri Sri Giridhar Jiu Thakur, Sri Sri Gobind Jiu Thakur, Sri Sri Gopal Jiu Thakur and Kamalai Thakurani, installed in village Kaima Bada of the district of Cuttack. The plaintiffs and the defendant are three brothers forming a joint Hindu family. Two of the aforesaid four deities, namely, Sri Sri Giridhari Jiu Thakur, and Sri Sri Gobind Jiu Thakur, appear to have been installed in a *math* which was founded by one Haridas, a celibate Vaishnava, for the purpose of promotion of the Vaishnava religion. The institution appears to have been founded by three *sanads* in the years 1151, 1154 and 1164 Fasli. Certain properties mentioned in schedule *kha* of the plaint were endowed for the purpose. The succession to the headship of the *math* passed from *guru* to *chela* till the death of one Padma Charan Das, the *Guru Adhikari* of the *math* in 1907.

Thereafter, a dispute arose between two persons Anadi Das and Brahmananda Das, and, as a result of a compromise, both of them were recorded as joint *Adhikaris* of the *math*. In the year 1909, these two *Adhikaris* executed what has been called a *seba-samarpanpatra* in favour of the defendant Narayan Prusti and four other persons. By this *seba-samarpanpatra* the right of management as well as the endowed properties appear to have been transferred to the defendant Narayana Prusti and four other persons. This transfer was made to pay off a creditor Balaram Das of Patpur, who had obtained a decree for a sum of Rs. 1120-10-0 against the *marfatdars*. On the same day on which the *seba-samarpanpatra* was executed the transferees executed a mortgage bond for Rs. 1000 in respect of the endowed properties in schedule *kha*. This mortgage was executed in favour of one Bhaban Sahu. By this mortgage the decree-holder Balaram Das was paid off. In 1912, a second *seba-samarpanpatra* was executed by the other four transferees in favour of the defendant Narayan Prusti for a consideration of Rs. 3000. By this *seba-samarpanpatra*, the other four persons gave up their right in favour of Narayan Prusti.

In 1926, Anadi Das and Brahmananda Das instituted a suit (No. 13 of 1926) for setting aside the two *seba-samarpanpatras* of 1909 and 1912 respectively, and for possession of the endowed properties. This suit appears to have been dismissed on the ground of limitation, and on a finding that the defendant had acquired the *shebaiti* right by adverse possession. The case of the plaintiff is that Narayan Prusti had acquired the above *shebaiti* or *marfatdari* right as a member of the joint family, and on behalf of the joint family. It is alleged that the expenses for the worship of the deities and for other ceremonies and improvements had been defrayed from the joint family funds. It is also stated that the consideration for the two *seba-samarpanpatras* had come out of the joint family funds. I should have noted that two of the other deities, Sri Sri Gopal Jiu Thakur and the goddess Kamalai Thakurani, were installed in 1919, and schedule *kha* 1 and *kha* 2 properties were endowed for these two deities. The plaintiffs' case is that these two deities were installed by the joint family out of joint family funds, and the properties were purchased out of joint family funds. The plaintiffs alleged that in the current settlement the defendant had got his name recorded as

marfatdar in respect of the properties; therefore, the plaintiffs brought the suit for a declaration that they were *co-shebaitis* and *co-marfatdars* along with the defendant. The defendant denied the allegations made above, and alleged that the joint family had no concern with the *shebaiti* right; nor had any expenses been incurred out of joint family funds. The defendant also alleged that the endowment was a public religious endowment, and the *shebaitship* could not in law or fact go to more than one person. In the Court of first instance, the plaintiffs obtained a decree on the finding that the plaintiffs were *co-shebaitis* or *co-marfatdars*. The Court of appeal below reversed that finding, and dismissed the suit. Hence the present second appeal. When the appeal was first heard by this Court, the case was remitted to the learned District Judge for recording his findings on the following two questions:

"(1) Whether the religious institution with which we are concerned in this litigation is capable of having more than one *shebait* or *marfatdar*.

(2) Whether upon the evidence it can be held that the plaintiffs have acquired the *marfatdari* interest along with the defendant by adverse possession and whether the finding of the Subordinate Judge that the joint family fund was used for acquiring, improving and carrying on the *seva-puja* is justified by the evidence on the record."

The learned District Judge has now given his findings on the two questions referred to above, and they are in favour of the appellants. The learned District Judge, who had originally heard the appeal, had dismissed the suit of the plaintiffs mainly on the ground that the right of management by a *shebait* could not be transferred by sale or gift; nor could it be acquired as an incident to property. In my opinion, the learned District Judge was in error in dismissing the suit for the ground stated by him. It is no doubt true that a sale by a *shebait* or *mohant* of his right to manage debotter property is void. Their Lordships of the Judicial Committee have observed in 4 I. A. 76,¹ as quoted by the learned District Judge himself, that even if a custom be proved which sanctions the sale of such a right, the Courts should refuse to recognize it as being against public policy, specially where the sale is made to a stranger for the pecuniary benefit of the vendor. The case of the plaintiffs did not, however, rest on an acquisition of their right by purchase. The finding in the suit of 1926 brought by Anadi Das was that the defendant Narayan Prusti had

acquired the *shebaiti* right by adverse possession. The main question for decision, therefore, is if Narayan Prusti had acquired the right for himself alone or for the joint family of which he was a member along with the plaintiffs. That the right to manage charities, without any beneficial interest in the charity properties, can be vested in a joint Hindu family is, I think, well-settled. In such a case, the senior male member of the family is, until a partition is effected, entitled to exercise the right of management vested in the family on its behalf: see A.I.R. 1932 Mad. 162.²

There is, therefore, nothing in law which would prevent Narayan Prusti from acquiring the *shebaiti* right on behalf of the joint Hindu family. Whether he actually acquired the right on behalf of the joint family or not is primarily a question of fact. The learned District Judge was specifically asked to find whether on the evidence it can be held that the plaintiffs have acquired the *marfatdari* interest along with the defendant by adverse possession, and whether the finding of the Subordinate Judge that the joint family fund was used for acquiring, improving and carrying on the *sheva-puja* is justified by the evidence in the record. The learned District Judge has carefully considered the evidence, and has come to the finding that the plaintiffs-appellants had acquired the *marfatdari* right along with the defendant by adverse possession. He has further come to the finding that the joint family fund was used for acquiring, improving and carrying on the *sheva-puja*. These findings are primarily findings of fact, and are binding on us in second appeal. Nothing has been stated before us which would lead me to think that these findings are incorrect. The clear finding is that Narayan Prusti had no separate business or income of his own, and all acts were done by him as the karta of the joint family. It has been further found that the plaintiffs-appellants had also taken part in the performance of the festivals for the idols, such as Ras, Dol, Jhulan, Chandan Jatra, etc., and that expenses for these festivals had been met from the joint family funds. As far as two of the deities, Sri Sri Gopal Jiu Thakur and Kamalai Thakurani are concerned, these were installed on behalf of the joint family in 1919, and the endowed properties in schedule *kha* 1 and *kha* 2 were acquired from the joint family funds. In view of these findings, the plaintiffs are

1. (76-78) 1 Mad. 235 : 4 I. A. 76 : 3 Sar. 687 (P. C.), *Rajah Vurmah Valia v. Ravi Vurmah Kurshi Kutty*.

2. (32) 19 A. I. R. 1932 Mad 167 : 55 Mad. 385 : 135 I. C. 585, *Chinnappa v. Official Assignee*.

clearly entitled to a declaration that the *shebaiti* or *marfatdari* right belongs to the joint family, and that they have joint interest in such right along with the defendant.

The question as to whether there can be more than one *shebait* or *marfatdar* for this religious institution was also specifically referred to the learned District Judge, and the finding of the learned District Judge is that, though till 1907 the devolution of the office of *shebait* had been from *guru* to *chela*, there was a break in that year when two persons Anadi Das and Brahmananda Das became joint *shebait*s. From 1909 to 1912, five persons became *shebait*s. Narayan Prusty himself got the second *seba-samarpanpatra* from four other *shebait*s. The finding of the learned District Judge is that the evidence in the record does not show that this particular institution is incapable of having more than one *shebait* or *marfatdar*. In my view, this finding of the learned District Judge is correct. Learned counsel for the respondent referred us to the case in 41 Mad. 296.³ In that case, the objects for which the religious and charitable properties were given were described in the grants as being for the purpose of perpetually conducting a food *chatram* near the tomb of a holy man, and in one case of making an *agrahar* by building houses round the holy place. It was held that there was sufficient indication in the grants and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent with the purposes of the founder who must be deemed to have intended that the religious charities should be administered by the man who was head of the *math*, to which office the eldest son of the previous holder would succeed, the office not being the subject of partition, but being indivisible among the members of the family. The decision in that case turned mainly upon the terms of the grant. Their Lordships did not decide the general question of devolution of the office of *shebait*. Their Lordships observed as follows :

"It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class because, in their Lordships' view there is sufficient indication in the documents and in the surrounding circumstances of this case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowment."

In the particular case before us, the find-

3. ('17) 4 A.I.R. 1917 P.C. 190 : 41 Mad. 296 : 45 I. A. 1 : 43 I. C. 806 (P.C.), Sethurama Swamiar v. Meruswamiar.

ing of the learned District Judge is that there can be more than one *shebait*. It has been held that where the management can, without detriment to the trust, be held by turns, it is open to the members of the family to agree to or for the Court to decree management by turns or in some settled order or sequence : see 33 I. A. 139.⁴ We are not directly concerned in the present appeal with the question as to whether the right of management can be the subject of partition amongst the members of the joint family or not. The plaintiffs merely want a declaration that the right belongs to the joint family. The question whether the right can be the subject of partition can only be decided in a properly framed suit for the purpose. I am unable to accept the contention raised on behalf of the respondent that there cannot be more than one *shebait* in an institution of this nature. For the reasons given above, I would allow the appeal with costs throughout, and would restore the decree passed by the learned Subordinate Judge.

Manohar Lall J. — I agree.

R.K.

Appeal allowed.

4. ('06) 29 Mad. 283 : 33 I. A. 139 (P.C.), Ramanathan Chetti v. Murugappa Chetti.

[Case No. 8.]

A. I. R. (33) 1946 Patna 30

BEEVOR J.

Ramnarain Kedia and another
v.

Emperor.

Criminal Revn. No. 859 of 1945, Decided on 22nd August 1945, from Order of Judicial Commissioner, Chota Nagpur, D/- 3rd May 1945.

Cotton Cloth Control Order (1943), Cls. 13 and 14—One proprietor in management of shop—Unstamped cloth found on premises—Other co-proprietors not proved to have knowledge of such cloth being there—Such other co-proprietor cannot be said to be in actual control of the cloth.

No doubt where the shop is in the hands of a manager other than the managing proprietor it is possible that the proprietors may be criminally liable for the acts of their manager committed within the ordinary scope of his employment in the case of some criminal offences which involve no *mens rea*, but that principle cannot be applied as between co-proprietors so as to make a co-proprietor liable for the acts of his co-proprietor. [P 31 C 2]

Where it has not been proved that a co-proprietor either knew that an offence was being committed or was likely to be committed or that he had any reason to suppose that the unstamped cloth was on his premises or was likely to be there, it cannot be said that the cloth was actually under the control of the co-proprietor. [P 31 C 2]

Baldeva Sahay and R. K. Sahay —

for Petitioners.

Mehdi Imam — for the Crown.

Order. — The two petitioners have been convicted under R. 81 (4), Defence of India Rules, read with cls. 13 (1) (c) and 14 (1) (c), Cotton Cloth Control Order, 1943, and have been sentenced to a fine of Rs. 200 each, for being in possession of two saris which did not bear the requisite marks or stamps. The two petitioners are owners of a cloth shop in Ranchi and petitioner 2 is the managing proprietor. The cloth in question consisted of two saris which were recovered from a wooden box in a room behind the shop or the main portion of the shop and separated from that main portion by another room which was empty. Although at first a suggestion was made before me on behalf of the petitioners that it had not been established that the saris in question did not bear the requisite marks although the law did require any particular marks to be placed on these saris this point was later abandoned. By cl. 13 (1) (c), Cotton Cloth Control Order, 1943, no person other than a manufacturer shall, after 31st December 1943, have in his possession or under his control any such cloth or yarn which is not so marked unless it be for bona fide personal requirements. The petitioners put forward a case that these saris were required for bona fide personal requirements of members of their family. They produced two defence witnesses, but it is clear that those witnesses were not believed by the lower Courts and although I have heard the learned advocate for the petitioners in some detail regarding the actual circumstances as disclosed in the evidence, I am not satisfied that there is any reason for doubting the conclusion which the lower Courts have reached, viz., that these saris were not kept for bona fide personal requirements of members of the family of the petitioners.

There remains the question whether the petitioners had in their possession or under their control these saris. Petitioner 2 was the managing proprietor of the shop and it appears that he was present when the Cloth Inspector went there and I have no doubt that the circumstances established that the two saris were under his control if not actually in his possession. As regards petitioner 1, I consider that the position is different. No doubt the phrase "under his control" may be wider than "in his possession," but there are, no doubt, definite limits to this phrase "under his control" and I think it is quite clear that not everything which is found on premises belonging to a man is necessarily under his control. I do

not think that the exact limits of this phrase "under his control" are at all clear. But in the present case all that is found against petitioner 1 is that he was one of the co-proprietors in the cloth firm and that in a room behind the shop of that firm was found this cloth. Now had the shop been in the hands of a manager other than the managing proprietor it is possible that the proprietors might have been criminally liable for the acts of their manager committed within the ordinary scope of his employment in the case of some criminal offences which involved no *mens rea*. It is not at all clear to me, however, that that principal can be applied as between co-proprietors so as to make petitioner 1 liable for the acts of his co-proprietor petitioner 2 and I am not satisfied that the circumstances proved in this case disclose that petitioner 1 either knew that this offence was being committed or was likely to be committed or that he had any reason to suppose that this unstamped cloth was on his premises or was likely to be there. I am, therefore, not satisfied that the two saris were actually under the control of petitioner 1. On these findings the conviction and sentence passed on petitioner 1 are set aside but the petition of petitioner 2 is dismissed.

R.K.

Order accordingly.

[Case No. 9.]

A. I. R. (33) 1946 Patna 31

VARMA AND SHEARER JJ.

*Surendra Nath Chatterji — Defendant
— Appellant*

v.

*Jagat Narain Sarogi, Plaintiff, and
others, Defendants — Respondents.*

Appeal No. 1467 of 1943, Decided on 8th May 1945, from appellate decree of Additional District Judge, Bhagalpur, D/- 25th August 1943.

Civil P. C. (1908), S. 80—Receiver appointed by Court—Suit for realization of price for seeds supplied against dependants including receiver — Notice to receiver under S. 80, if necessary.

No doubt a receiver appointed by a Court of law is a public officer but a notice to him under S. 80 would be necessary only if the suit against him is in respect of any act purporting to be done by him in his official capacity : ('34) 21 A. I. R. 1934 P. C. 96 and ('40) 27 A. I. R. 1940 Pat. 516, *Rel. on.*

[P 33 C 1]

In a partition suit between the owners of an Oil Mill a receiver was appointed by the Court to manage the business of the mill and pay the net profits in Court for distribution among the parties. The plaintiff supplied oil seeds to the mill after the

appointment of the receiver. The receiver was managing the mill through a manager. The whole of the correspondence regarding the supply of seeds passed between the manager and the plaintiff. In the suit brought by the plaintiff for realization of a certain sum of money as the price of seeds supplied to the defendants, one of whom was the receiver, it was contended that the suit was not maintainable for want of notice to the receiver under S. 80, Civil P. C.:

Held that the receiver could not be said to have purported to act in his official capacity in not paying the price of seeds supplied and therefore no notice under S. 80 was necessary: ('18) 5 A. I. R. 1918 Mad. 62 (F. B.), *Foll.*; ('31) 18 A. I. R. 1931 Cal. 503; ('27) 14 A. I. R. 1927 P.C. 176 and ('30) 17 A. I. R. 1930 Cal. 737, *Ref.* [P 33 C 2]

C. P. C. —

('44) Chitale, S. 80, N. 3, Pts. 11, 12, 13, 16.

('41) Mulla, Page 306, Pts. (u), (v); Page 307, Pt. (j).

P. R. Das, S. C. Mazumdar and S. K. Majumdar — for Appellant.

J. C. Sanyal — for Respondents.

Varma J. — This is an appeal on behalf of defendant 3 in a suit by the plaintiff for realization of a certain sum of money as the price of seeds supplied to the defendants under different contracts as the defendants were running the Victoria Mills. The trial Court dismissed the suit on the ground that notice under S. 80, Civil P. C., was not served on defendant 3 although he was a receiver appointed by a Court in charge of the Victoria Mills. It also held that the plaintiff had no cause of action against the other defendants. On appeal before the Additional District Judge it was held by him that the suit was maintainable and notice under S. 80, Civil P. C., was not necessary. He accepted the finding of the trial Court about the non-liability of the other defendants.

In order to appreciate the points raised by Mr. P. R. Das it is necessary to give a few more facts. The defendants have got a mill in the town of Bhagalpur known as the Victoria Mill Co. They manufacture different kinds of oil. The business of the mill, according to the plaintiff, is carried on through the manager, Mr. C. S. Ghosh. The plaintiff used to supply seeds and it is for the price of the seeds that he has sued the defendants. In the year 1932 there was a suit for partition of the ancestral property of the defendants including the mill in question, amongst the four brothers, and the Court by its order dated 8th September 1933, appointed defendant 3 to be the receiver of the properties which were the subject-matter of partition. The mill was placed in his charge as the receiver. The business of the mill was carried on by the defendant as re-

ceiver through the manager, Mr. C. S. Ghosh. The lower appellate Court points out, while dealing with the question of notice under S. 80, that it was true that the transactions in respect of which the suit was filed were subsequent to the appointment of defendant 3 as the receiver of the mill. The order appointing him is Ex. C in the case. By this order he was appointed the receiver and was enjoined "to work the mill" and manage the business to his best skill and ability, to submit monthly accounts, and to see that the cash and assets of the mill were not affected in any way. He was to get 25 per cent. of the net profits as remuneration as receiver and was to deposit the rest of the profits, if any, to be distributed amongst the parties at the time of partition. After referring to the evidence in the case, the lower appellate Court points out that, although defendant 3 was appointed receiver of the mill all its business used to be carried on by a manager, Mr. C. S. Ghosh. All the letters appear to have been written by the manager. Plaintiff's witness 1 said that he had no information before the institution of the suit that Babu Surendra Nath Chatterji was appointed the receiver by the Court in a partition suit. The lower appellate Court also points out that the letters that were addressed by the manager to the plaintiff did not appear to show that the manager was writing on behalf of the receiver. In these circumstances the lower appellate Court held that the order appointing defendant 3 as receiver was not an order which would operate as an order in rem.

The lower appellate Court has relied upon the case in 61 Cal. 470¹ in which their Lordships of the Judicial Committee held that in a case of a suit against a public officer it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that a notice under S. 80, Civil P. C., is enjoined and the failure to pay a claim by a public officer cannot be said to be an act purporting to be done by him in his official capacity. Therefore, the lower appellate Court found that the failure to pay the dues of the plaintiff by defendant 3 did not amount to an official act and consequently it was not necessary for the plaintiff in the present case to serve a notice under S. 80, Civil P. C., upon him. The lower appellate Court also refers to the decision of this Court in

1. ('34) 21 A. I. R. 1934 P. C. 96 : 61 Cal. 470 : 61 I. A. 171 : 148 I. C. 482 (P. C.), *Reoti Mohan v. Jatendra Mohan*.

19 Pat. 493.² The case there also turned upon the question whether the claim was against the receiver with regard to acts which purported to have been done by the receiver in his official capacity. Chatterji J. in his judgment observed that non-payment of the royalty could not be said to be an official act done by the receiver and, consequently, the suit was not bad for want of a notice on the receiver. The lower appellate Court referred to the cases relied upon by the trial Court : A. I. R. 1931 Cal. 503,³ 54 I. A. 838⁴ and 34 C.W.N. 671⁵ and held that these cases did not apply to the facts of the present case. Mr. P. R. Das appearing for the appellant has urged that the receiver is a public servant, that the provisions of S. 80, Civil P. C., are mandatory as was held in 54 I.A. 338,⁴ and that on the provisions of S. 80 it had to be established that the cause was an official act and the receiver was personally liable. In the present case, Mr. Das urges that although the suit was filed against defendant 3 in his personal capacity, by an amendment of the plaint on 25th June 1941, defendant 3 was described as a receiver and therefore it attracted the provisions of S. 80. Section 80, Civil P. C., runs as follows :

"No suit shall be instituted against the Crown, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered to, or left at the office of (a) in the case of a suit against the Central Government, a Secretary to that Government; (b) in the case of a suit against the Crown Representative, the Political Secretary; (c) in the case of a suit against the Provincial Government, a Secretary to that Government or the Collector of the district and (d) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted, and, in a case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

In the present case there is no doubt that defendant 3 was appointed a receiver and a receiver appointed by a Court of law is a

public officer. The question that we have to consider is whether the suit was against him in respect of any act "purporting to be done" by him in his official capacity. Now, the expression "purporting to be done" was the subject-matter of consideration in 41 Mad. 792 = A.I.R. 1918 Mad. 62.⁶ On account of a difference between two Judges of a Division Bench the case was referred to a Full Bench. Both the referring Judges were of opinion that the acts done by the defendant came within the words "any act purporting to be done by such public officer in his official capacity"; but the point for decision that was referred to a Full Bench was,

"whether in consequence of his want of bona fides defendant 1 forfeited his right to notice before suit under S. 80, Civil P. C."

Sadasiva Aiyar J. in his judgment, while referring to this expression pointed out that the verb 'purport' is defined in the Concise Oxford Dictionary as 'convey', 'state', 'profess', 'be intended to seem'; and the Latin root signifies 'carry forth'. The synonym 'profess' has as two of its definitions 'pretend' and 'openly declare'. He said :

"I therefore think that the expression 'any act purporting to be done by such public officer in his official capacity' found in S. 80, Civil P. C., means any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance."

Later on, he observes :

"An act done by public officer would 'purport' to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers, but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity. But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice."

Spencer J. also observed :

"I think that the word 'purporting' covers a profession by acts or by words or by appearance of what is true as well as of what is not true."

On the materials to which the lower appellate Court has referred there is nothing to indicate that defendant 3 purported to act in his official capacity. In this view of the matter I am of opinion that no notice under S. 80, Civil P. C., was necessary. As the only

6. (18) 5 AIR 1918 Mad. 62; 41 Mad. 792; 46 I.C. 86 (FB). Koti Reddi v. Subbiah.

2. (40) 27 A. I. R. 1940 Pat. 516 : 19 Pat. 433 : 192 I. C. 17, Joti Prasad Singh v. Samuel Henry Seddon.

3. (31) 18 A.I.R. 1931 Cal. 503; 58 Cal. 850 : 132 I. C. 634, Jagdish Chandra v. Debendra Prasad.

4. (27) 14 AIR 1927 P. C. 176; 51 Bom. 725 : 54 I. A. 338 : 104 I. C. 257 (P.C.), Bbag Chand v. Secy. of State.

5. (30) 17 AIR 1930 Cal. 737 : 128 I.C. 103 : 34 C.W.N. 671, Radharani Dasgupta v. Purna Chandra Sarkar.

point urged on behalf of the appellant has failed I would dismiss this appeal with costs. The cross-objection filed on behalf of the plaintiff was evidently filed under a misapprehension of facts and it was not seriously pressed before us. I would, therefore, dismiss the cross-objection, but there will be no order as to costs.

Shearer J. — I agree.

G.N./V.S.

Appeal dismissed.

[*Case No. 10.*]

A. I. R. (33) 1946 Patna 34

MANOHAR LALL AND DAS JJ.

Narsingh Charan Das — Petitioner

v.

Emperor.

Criminal Revn. No. 96 of 1944, Decided on 18th April 1945 (Cuttack circuit), from order of Sess. Judge, Cuttack-Sambalpur, D/- 15th June 1944.

Defence of India Rules (1939), R. 75A (1), Proviso — Yield of dedicated property is protected under proviso — 'Used for purposes of religious worship' explained — Burden of proving what property is required and what is not required is on prosecution and not on accused.

The expression 'used for the purpose of religious worship' not only includes such property as is actually used for religious worship, but also includes ancillary purposes, such as the maintenance of the family of the sebit, selling part of the property for acquiring other articles necessary for the deity, etc., in the case of dedicated property. It is for the prosecution and not for the accused to prove what part of the property was required for religious worship and what part was not so required. The yield from dedicated property cannot be requisitioned in view of the proviso to R. 75A (1). [P 35 C 1, 2]

P. C. Chatterji and B. K. Pal—for Petitioner.
Advocate-General — for the Crown.

Das J.—The petitioner Narsingh Charan Das has been found guilty of contravening an order passed under R. 75A, Defence of India Rules, and he has been sentenced under sub-r. (7) of that rule to rigorous imprisonment for two months and a fine of Rs. 500, or in default to rigorous imprisonment for a period of five months. The petitioner appealed to the learned Sessions Judge which appeal was dismissed. Hence, the present application in revision.

The case against the petitioner was the following. The petitioner and his father resided in village Pritipur. His father died on 7th June 1943. In 1942-43 there was scarcity of food in the locality, and the District Magistrate had a list of stockists of paddy compiled within the sub-division of Jajpur. The list was prepared in December 1942. It was reported then that Chandramani Das, father of the present petitioner, had 1200

maunds of paddy in stock. By an order dated 16th May 1943, passed under R. 75A, Defence of India Rules, the District Magistrate requisitioned the aforesaid 1200 maunds of paddy, and directed Chandramani Das to make over the paddy to the Sub-divisional Magistrate of Jajpur, or his nominee. Chandramani Das, however, died shortly after, i. e., on 7th June 1943, and on 24th June 1943, the present petitioner was similarly served with an order under R. 75A, Defence of India Rules. One Bashiruddin Khan was sent by the Sub-divisional Magistrate of Jajpur to receive delivery of 1200 maunds of paddy from the petitioner. On 29th June 1943, Bashiruddin Khan came to the house of the petitioner with some bullock carts. It is stated that the petitioner gave only 30½ maunds of paddy on that occasion, and refused to deliver the remainder of the paddy. On this, the petitioner was put on trial for a contravention of an order made under R. 75A, Defence of India Rules.

Both the Courts below have accepted the prosecution case that the petitioner had contravened an order under R. 75A, Defence of India Rules, and was, therefore, liable to be punished under sub-r. (7) of the said rule.

On behalf of the petitioner, two points have been urged before us. It is firstly contended by the learned advocate for the petitioner that the petitioner did not have 1200 maunds of paddy at the time the requisition order was passed. Both Courts have carefully examined the evidence on this point, and they have come to the finding that the petitioner had more than 1200 maunds of paddy at that time. I see no reason to differ from their finding on this point. This contention raised on behalf of the petitioner must, therefore, fail.

The petitioner is, however, entitled to succeed on the second point, urged on his behalf. It appears that the lands from which the yield of the paddy was received are recorded in the record-of-rights as belonging to a family deity Sri Radhakant Thakur of which the petitioner's father and thereafter the petitioner were the *sebit*. The learned advocate for the petitioner relies on the proviso to R. 75A (1), Defence of India Rules, which states that no property used for the purpose of religious worship shall be requisitioned under the rule. The question is whether the paddy in question is property used for the purpose of religious worship. The appellate Court has given no very clear finding on this point. In one part of the judgment, the appellate Court has found that

this is an instance of a private endowment. In another part of the judgment, the appellate Court finds that the dedication is a nominal dedication and the beneficial ownership has always remained with the father of the petitioner, and after his demise, with the petitioner. The trial Court has found that the petitioner holds the lands as *sebait* of the deity. The trial Court proceeded on the footing that the entire produce of the land was not used for religious worship, and, on that basis, convicted the petitioner.

There is, I think, no doubt that the lands from which the paddy has been received are owned by the deity, and the petitioner is only a trustee. In view of the entry in the record-of-rights which must be presumed to be correct unless the contrary is shown, it cannot be said that this is a fictitious or nominal dedication. The learned Advocate-General has contended before us that this may be a case, not of complete dedication, but of partial dedication, where a certain property is subject to the charge of *rajbhog*, etc., of a deity. There is, however, no clear evidence in the record making out a case of partial dedication as against the entry in the record-of-rights which makes out a case of complete dedication. Alternatively, it has been argued by the learned Advocate-General that even if this be a case of complete dedication, the proviso to R. 75A (1) will apply only if it is shown that the property in question is actually used for the purpose of religious worship. It is contended by him that all the 1200 maunds of paddy were not used for the purpose of religious worship. There is some evidence in the record to show that the petitioner utilised part of the paddy for the maintenance of the family, for meeting the expenses of the illness of his father, and part of the paddy was sold to other people. The difficulty, however, is that there is no definite evidence as to what quantity of paddy was required for *rajbhog*, etc., of the deity which certainly would come within the expression "used for the purpose of religious worship." Even accepting the contention of the learned Advocate-General regarding the interpretation of the proviso to R. 75A (1), namely, that it excludes only such property as is actually used for religious worship, it was, I think, for the prosecution to prove what quantity of paddy was required for religious worship, and what was not required for that purpose. I must state, however, that, in my opinion, the expression 'used for the purpose of religious worship' must also include ancillary purposes, such as the main-

tenance of the family of the *sebait* selling part of the paddy for acquiring other articles necessary for the deity, etc., in the case of dedicated property. I am unable to accept the argument that it was for the accused to prove what part of the paddy was required for religious worship and what part was not so required. The case of the accused at the trial was that the entire produce belonged to the deity, and was required for religious worship. Reference was made on behalf of the Crown to Ex. 4, the list prepared by the Chakla Kanungo. This list shows that 1200 maunds of paddy represented the stock at the end of the last harvesting season. The use of the produce of the land for the deity must be a day-to-day use, and some stock must be kept for future use. Even if the trustee mismanages trust property or diverts it to other purposes, the property does not lose its character of trust property. In the absence of any clear evidence that the 1200 maunds of paddy or any part of it, the whole of which undoubtedly belonged to the deity, were not required for religious worship, I think the proviso to R. 75A (1) protects the petitioner. Such property could not be requisitioned under R. 75A, Defence of India Rules.

The learned advocate for the petitioner also referred to the charge, and contended that the charge was defective. He further said that the District Magistrate had not merely requisitioned the property, but had passed an order of acquisition at the same time. His contention is that in view of the order of acquisition, the property vested in the Crown and the petitioner could not be convicted of contravening an order of requisition. In my opinion, this contention is not sound. By the order of requisition, the petitioner was directed to deliver 1200 maunds of paddy. The expression "requisition" has been defined in R. 2 (11) and it includes an order requiring the property to be placed at the disposal of the requisitioning authority. This is the particular order which the petitioner is stated to have contravened. If the proviso to R. 75A (1) does not apply then the petitioner would be guilty. For the reasons I have given above, I am of the view that the proviso to R. 75A (1) applies in the present case.

The result, therefore, is that the application is allowed, and the conviction and sentence passed against the petitioner are set aside. The petitioner should be forthwith released if in jail. If he is on bail, the bail

bond will be discharged. The fine, if paid, should be refunded to the petitioner.

Manohar Lall J. — I agree.

R.K./V.S.

Revision allowed.

[Case No. 11.]

A. I. R. (33) 1946 Patna 36

CHATTERJI AND SHEARER JJ.

Ram Ranbijoy Prasad Singh —

Plaintiff—Appellant
v.

Badri Upadhy and others —

Defendants — Respondents.

Second Appeal No. 504 of 1943, Decided on 8th May 1945, from decree of Sub-Judge, Arrah, D/- 12th February 1943.

Transfer of Property Act (1882), Ss. 76 (c) and 77 — Possessory mortgagee not paying rent — Landlord in rent suit purchasing property himself — Subsequent suit by landlord for redemption — Landlord held not entitled to set off arrears of rent.

Clause (c) of S. 76 merely casts upon the mortgagee in possession the liability to pay all charges of a public nature and all rent accruing due in respect of the property during his possession. This clause has no reference to any accounting. The mortgage by *R* in favour of *B* for a term of four years was a combination of a usufructuary mortgage and a simple mortgage. The mortgage-deed provided that the mortgagee would remain in possession of the tenure and would appropriate its usufruct in lieu of interest after paying the annual rent of Rs. 22-11-0 to the landlord. There was also a stipulation that in case of dispossession, the mortgagee was to be entitled to recover the principal with interest at 2 per cent. per mensem by sale of the mortgaged property. The landlord, *M* obtained a decree for arrears of rent of the tenure, and in execution of the decree purchased it. *M* then brought the suit for redemption, alleging that *B* never made any payment to him, and that the amount of rent withheld exceeded the rehan money by Rs. 1010-6-9. *M*, therefore, not only claimed possession but also the excess amount said to be due from *B*:

Held that M was not entitled to claim a set-off.

[P 36 C 2; P 37 C 1, 2; P 39 C 1]

Sarjoo Prasad and Harinandan Singh —

for Appellant.

Harians Kumar and Brahmdeo Narain —

for Respondents.

Chatterji J. — This is an appeal by the plaintiff in a suit for redemption. The plaintiff is the 16 annas proprietor of village Dubauli in which one Rachya Lal had a tenure of 21.06 acres of land. On 6th June 1914 Rachya Lal executed a mortgage in respect of this tenure in favour of the defendants for a consideration of Rs. 300. The mortgage which was for a term of four years was a combination of a usufructuary mortgage and a simple mortgage. The mortgage-deed provided that the mortgagees would remain in possession of the tenure

and would appropriate its usufruct in lieu of interest after paying the annual rent of Rs. 22-11-0 to the landlord. There was also a stipulation that in case of dispossession, the mortgagees would be entitled to recover the principal with interest at 2 per cent. per mensem by sale of the mortgaged property. The plaintiff's father, who was then the landlord, obtained a decree for arrears of rent of the tenure, and in execution of the decree purchased it on 11th July 1919. Many years later, in 1939, the plaintiff brought a suit for rent against the tenants who were in cultivating possession of the lands comprised in the tenure. The tenants disputed the plaintiff's right to realise rent and pleaded payment to the usufructuary mortgagees, that is, the defendants. The rent suits were dismissed. The plaintiff then brought the present suit for redemption on 28th September 1940. In the plaint it was alleged that though the defendants were bound to pay the rent of the tenure to the plaintiff, they never made any payment to him, and that the amount of rent withheld by the defendants exceeded the *rehan* money by Rupees 1010-6-9. The plaintiff, therefore, not only claimed possession but also the excess amount said to be due from the defendants.

The defendants raised various objections, but the only one that is material to the present appeal was that in this suit for redemption the plaintiff could not claim any amount which would be payable to him as landlord on account of rent. The learned Munsif accepted this defence and passed a decree for redemption on the condition that the plaintiff should pay Rs. 300, the principal amount of the mortgage. On appeal by the plaintiff, the learned Subordinate Judge held that the plaintiff should be allowed a set off for the rent that was legally recoverable up to the date of the decree. This amount was found to be Rs. 113-12-0. He accordingly modified the decree of the learned Munsif to this extent that the plaintiff should pay Rs. 196-4-0 (should be Rupees 186-4-0) only as redemption money.

The plaintiff, being dissatisfied with this decision, has preferred this second appeal. There is no cross-objection by the defendants. It has been argued by Mr. Sarjoo Prasad on behalf of the appellant that the defendants being liable to pay rent to the plaintiff under the terms of the bond as well as under S. 76 (c), T. P. Act, it is most inequitable that the defendants should be allowed to keep in their own hands the money due from them to the plaintiff, and

at the same time require the plaintiff to pay to them the money due to him. Reliance has been placed on the cases in 5 Cal. 333¹ and 46 ALL. 633.² In the first case, 5 Cal. 333,¹ the plaintiff had granted a zerpesghi lease of certain property to the defendant for a term of years at a yearly rent of Rs. 130 on an advance of Rs. 800. It was agreed that the lessee should be allowed to deduct out of the rent, Rs. 96 as interest on the advance made by him, and the remainder Rs. 34 was to be paid over in cash to the lessor. In the suit, which was brought for redemption, it was held that the plaintiff was entitled to set-off the rent withheld by the defendant against the money advanced. In the second case, 46 ALL. 633,² the usufructuary mortgage of which redemption was sought provided that the mortgagee should pay to the mortgagor a fixed sum of Rs. 25 a year as "malikana," and that except for this sum, there was to be no accounting between the parties. No "malikana" was ever paid. In the suit which was brought by the mortgagor for redemption, the defendants contended that the plaintiff could obtain the arrears of "malikana" only by means of a separate suit. This contention was overruled and the Court passed a decree for redemption on payment of the principal sum due, less the "malikana" for a certain number of years.

It will thus appear that in both these cases there was a stipulation in the mortgage-deed itself that the mortgagee should make payment of the specified amount to the mortgagor. It was, therefore, obviously inequitable that the mortgagee should be allowed to retain in his own hands the money due from him to the mortgagor under the terms of the mortgage, and at the same time would require the mortgagor to pay to him the money due on his side. In the present case there was no stipulation that the mortgagee should pay rent of the mortgaged property to or through the mortgagor. Therefore, the principle of the above decisions cannot apply to the present case.

It is, however, argued by Mr. Sarjoo Prasad that the plaintiff, by reason of his auction-purchase, having stepped into the shoes of the mortgagor, the position must be the same as if he was himself the mortgagor. In other words, the mortgagee must be deemed to have contracted to pay the

rent to the mortgagor. In this view the principle of the above decisions would apply. But on the clear terms of the mortgage itself, it is difficult to take this view. It is true that the mortgagor and the landlord are now the same person, but in this suit for redemption the landlord who has stepped into the shoes of the mortgagor cannot claim any higher right than the mortgagor. The mortgagor, if he had sued for redemption, could not certainly claim any set-off on account of the rent, unless he had himself paid it to the landlord. I was at first inclined to think that it would not be equitable to disallow the plaintiff's claim for set-off in respect of the rent withheld by the defendants. But after further consideration I am of opinion that the suit being for redemption, the rights of the parties must be determined with reference to the terms of the mortgage and with reference to the provisions of S. 77, T. P. Act. This section runs as follows :

"Nothing in S. 76, cls. (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal".

In this case the contract between the mortgagor and the mortgagee was that the receipts from the mortgaged property should be taken by the mortgagee, while in possession of the property, in lieu of interest on the principal money. Consequently, the mortgagee is not liable to account, as required under cl. (h) of S. 76 of the Act. Mr. Sarjoo Prasad has drawn our attention to the fact that cl. (c) of S. 76 is not to be found in S. 77. But cl. (c) of S. 76 merely casts upon the mortgagee in possession the liability to pay all charges of a public nature and all rent accruing due in respect of the property during his possession. This clause has no reference to any accounting. In 7 Pat. 44,³ decided by Jwala Prasad and James JJ., their Lordships had to deal with a usufructuary mortgage under the terms of which the mortgagee was entitled to appropriate in lieu of interest the profits of the property remaining after the payment of Government revenue and malikana to the malikanadars. There was a condition that all profits from increased income would go to the mortgagee. The mortgagee made additional profits by escaping payment of malikana to the malikanadars. The assignee

1. ('80) 5 Cal. 333, *Nursingh Narain Singh v. Baboo Lukputty Singh*.

2. ('24) 11 A. I. R. 1924 All. 591 : 46 All. 633 : 82 I. C. 25, *Bihari Lal v. Shib Lal*.

3. ('29) 16 A. I. R. 1929 Pat. 37 : 7 Pat. 44 : 114 I. C. 473, *Raghubar Narayan v. Mohit Narayan*.

of the equity of redemption brought a suit for redemption and for accounts. It was held that the usufructuary mortgagee was not liable to render accounts in respect of the malikana. It should be made clear that the malikana was to be paid not to the mortgagor but to a third person. James J., who delivered the judgment, said :

"We are of opinion that the mortgagees' failure to pay the malikana does not render them liable for account, nor does it necessarily affect the liability of the mortgagors to pay the mortgage-money before they can recover possession of the property. The utmost that the mortgagors can be allowed to claim is that they should be indemnified against the contingency that a valid claim for arrears of malikana may be made against them after their recovery of possession."

It is on the strength of this last observation, though, strictly speaking, it does not apply to the facts of the present case, that the learned Subordinate Judge in this case has allowed the plaintiff a set-off for the arrears of rent legally recoverable. In an unreported case (S. A. Nos. 480 and 481 of 1941⁴) decided by Harries C. J. and Manohar Lall J., a similar question came up for consideration. There an occupancy holding had been given in mortgage by two different deeds executed on different dates, each being in respect of a portion of the holding. The mortgage-deeds provided that the mortgagees would remain in possession and would appropriate the produce of the lands in lieu of interest on the money advanced and would pay the proportionate rent to the landlord. Subsequently, the landlord in execution of a decree obtained by him against the raiyat for another holding purchased the mortgaged holding. The landlord then sued for redemption of the two mortgages, and he claimed a set-off for the rent due to him against the mortgage-money. This claim was rejected. Manohar Lall J. who delivered the judgment, said :

"As a landlord the only rights of the Maharaja are to recover arrears of rent not from the mortgagee but from his tenants. But the arrears of rent are being claimed in this case from the date when the Maharaja became the purchaser of the interest of his tenants. From this date onward the tenant and the landlord became one and the liability to pay rent disappeared."

In holding that the liability to pay rent disappeared, his Lordship apparently proceeded on the assumption that the holding ceased to exist when it was purchased by the landlord. In other words, there was a merger by reason of the entire interests of the landlord and the tenant in the holding being united in the same person, as contemplated by S. 22 (1), Bihar Tenancy Act. But

4. S. A. Nos. 480 and 481 of 1941, Nagina Kuer v. Ramran Vijaya Prasad Singh.

what the landlord purchased was only the tenant's equity of redemption and not his entire interest in the holding. A part of his interest still remained with the mortgagee. Suppose in the present case the mortgagee brought a suit on his mortgage and obtained a decree for sale, and eventually he purchased it. Can it be said that he would purchase it free from the liability to pay rent? Certainly not. As a purchaser of the holding, he would be liable to pay rent. How, then, can it be said that the liability to pay rent disappeared when the landlord purchased the equity of redemption? Though, however, with the greatest respect I do not agree with the above reasoning of Manohar Lall J., I think his decision is correct, and at any rate it is binding on us. In the result I would dismiss the appeal, but, in the circumstances, without costs. It should, however, be noted in the decree that the plaintiff should pay Rs. 186-4-0 and not Rs. 196-4-0 for redemption.

Shearer J. — The mortgagee was entitled to appropriate the whole of the profits of the land in lieu of interest, and was, in consequence, not liable to account to the mortgagor. That, however, merely means that in no circumstances is the mortgagor entitled to recover any money from the mortgagee on the ground that the amount of the profits which the latter has derived from the property exceeds the principal and interest due under the mortgage. The question that really arises here is a somewhat different one, namely whether the mortgagor is entitled to say that he has made, or must be deemed to have made, certain payments from time to time which can in law be treated as part payments of the mortgage-debt, and that, in consequence, the mortgage-debt has been liquidated, and he may recover possession of the mortgaged property without any further payment to the mortgagee. Under the terms of the mortgage-deed, the mortgagee was liable to pay the rent. If the mortgagee failed to pay it, and the mortgagor paid it instead, the latter could have treated each such payment as part payment of the mortgage-debt and asked for a corresponding reduction to be made in the amount ordered to be paid for redemption of the mortgage if and when he instituted a redemption suit: *see Ghose on the Law of Mortgage in India*, 4th Edn., Vol. I, page 560. In fact, a doubt has been expressed as to whether a mortgagor who has made such payments is entitled to recover the money from the mortgagee

immediately, and is not bound to wait until he is in a position to sue for redemption of the mortgage and then ask for a set-off: see 14 M. L. J. 488.⁵ Such difficulty as there is in this case arises from the fact that in 1919, that is, five years after the mortgage-deed was executed, the equity of redemption was purchased by the landlord. By reason of the concluding words in sub-s. (1) of S. 22, Bihar Tenancy Act, the mortgage and therefore also, I think, the liability of the mortgagee to pay the rent continued to subsist. If the landlord had called on the mortgagee to pay the rent and had intimated to him that if he failed to pay any *kist* as it fell due he would credit him with the amount in his *laggit* or *jamabandi* and treat this as a part payment by himself of the mortgage-debt, he would, I am inclined to think, have now been entitled to have any such amounts set-off against the amount still due under the mortgage. This, however, the plaintiff did not do and it is a little difficult to say that he has, in fact, made any payments which can be treated as payments in liquidation of the mortgage-debt. For this reason mainly I agree to the order proposed.

R.K.

Appeal dismissed.

5. ('04) 14 M. L. J. 488, *Krishnier v. Arappuli Iyar*.

[Case No. 12.]

A. I. R. (33) 1946 Patna 39

FAZL ALI C. J. AND

MANOHAR LALL J.

Commissioner of Income-tax, B. & O. —
Applicant

v.

Dalmia Cement Ltd., Dalmianagar —
Respondent.

Misc. Judicial Case No. 3 of 1945, Decided on 15th August 1945.

Income-tax Act (1922), S. 10 (2) (vi) and (3) — Depreciation — Factory used for two months only — Whole depreciation is claimable.

The words "not wholly used for the purposes of the business, profession" etc., in sub-s. (3) of S. 10 do not mean not used throughout the year or during the whole of the year in question. They mean that the machinery, building, etc., have not been used exclusively for the purposes of the profession or vocation, that is to say, they have been used for other purposes also. [P 40 C 1]

Where a factory has worked for only two months the assessee is entitled to deduct the whole amount which is allowable under cl. (vi) of S. 10 (2) and not merely the amount proportionate to the period during which the factory was actually working. ('37) 24 A. I. R. 1937 Bom. 493, *Rel. on*. [P 40 C 1, 2]

S. N. Dutt — for Applicant.

Advocate — for Respondent.

Jammu & Kashmir

Srinagar

Fazl Ali C. J. — This case has been referred to us on the application of the Commissioner of Income-tax for the decision of the following question:

"On the facts found is the assessee entitled to the full depreciation allowance under S. 10 (2) (vi), Income-tax Act."

The assessee Dalmia Cement Ltd. is a company owning a number of cement factories one of which is Dandot Cement Factory and inasmuch as during the relevant year the Dandot Cement Factory worked only for a period of nearly two months a dispute arose between the assessee and the Income-tax Department as to whether in these circumstances the assessee was entitled to claim the full amount allowable under S. 10 (2) (vi) which runs as follows:

"in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee a sum equivalent . . . to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed."

The contention of the assessee was that the full amount which is allowable under this provision should be deducted, whereas the department contended that only such amount should be deducted as is proportionate to the period during which the factory was actually working. The tribunal has accepted the assessee's contention and hence this reference at the instance of the Commissioner of Income-tax who is dissatisfied with the decision of the tribunal. Sub-clause (vi) is obviously to be read with sub-cl. (iv) as the words "building, machinery, plant or furniture" are preceded by the word "such". When these two clauses are read together it becomes apparent that the words "such building, machinery" etc., mean "building, machinery etc., used for the purposes of the business, profession or vocation". In 10 I. T. C. 386¹ in explaining the meaning of the word "used" Beaumont C. J. observed as follows:

"I agree with the view expressed by the Commissioner of Income-tax and in the cases to which he refers, that "used" denotes actual user; and not merely being capable of being used. But that does not dispose of the question whether, when machinery is kept ready for use at any moment in a particular factory under an express contract from which taxable profits are earned, the machinery can be said to be used for the purposes of the business which earns the profits, although it is not actually worked. To my mind, it is so used. The business from which the profits were derived was

1. ('37) 24 A. I. R. 1937 Bom. 493 : I. L. R. (1937) Bom. 821 : 174 I. C. 327 : 10 I. T. C. 386, *Vishwanath Bhaskar v. Commr. of Income-tax Bombay*.

that of ginning factories, and the contribution of the assessee to that business was the obligation to keep his machinery ready for actual use at any moment. It is no doubt true, as the learned Advocate-General says, that it is possible to give to the word "used" a more limited meaning and hold that it includes only the actual working of the machinery, and it is urged that it is that working which occasions depreciation. But, I think that the word "used" in this section may be given a wider meaning and embrace passive as well as active user. Machinery which is kept idle may well depreciate, particularly during the monsoon season. It seems to me that the ultimate test is, whether without the particular user of the machinery relied upon, the profits sought to be taxed could have been made."

These observations, with which I agree, show that depreciation may be allowed in certain cases even though the machinery was not in use or was kept idle. Mr. Dutt, counsel for the Income-tax Department, relies upon S. 10, cl. (3) which runs as follows:

"Where any building, machinery, plant or furniture in respect of which any allowance is due under cl. (iv), cl. (v), cl. (vi) or cl. (vii) of sub-s. (2) is not wholly used for the purposes of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used."

It appears that the appellate Assistant Commissioner was also of the opinion that this sub-section applied to the present case and he stated in his appellate order that "inasmuch as the factory worked for two months only therefore two months depreciation is admissible on the proportionate basis." In my opinion, however, this sub-section cannot be invoked in the present case. The words "not wholly used for the purposes of the business, profession" etc., do not mean not used throughout the year or during the whole of the year in question. They mean that the building, machinery, etc., have not been used exclusively for the purpose of the profession or vocation, that is to say, they have been used for other purposes also. There is no such provision in the Act as would justify the view that if the machinery is not used throughout the year, then the period for which it has worked should be calculated and depreciation should be allowed in proportion to such period. It was contended by Mr. Dutt that the view suggested by him would be the most equitable view and must have been contemplated by the Act. This, however, is not borne out by the language of the provision which is applicable and if there is any defect in the language, that cannot be made up in the way suggested by the learned counsel. I would, therefore, answer the question for-

mulated by the tribunal in the affirmative and hold that the deduction claimed by the assessee has been rightly allowed by the tribunal. The assessee company will be entitled to their costs which I assess at Rs. 250-

Manohar Lall J.—I agree.

R.K.

Reference answered.

[Case No. 13.]

A. I. R. (33) 1946 Patna 40

MEREDITH AND IMAM JJ.

Hirday Singh and others—Appellants
v.

Emperor.

Criminal Appeals Nos. 36 and 37 of 1945, Decided on 8th May 1945, from decision of Sess. Judge, Monghyr, D/- 18th December 1944.

(a) Criminal P. C. (1898), S. 239 — "Same-transaction" explained and illustrated—Continuity of action and purpose is test and not distance or proximity of time.

As to what is the same transaction must depend upon the facts and circumstances of each particular case. It is not the distance nor the proximity of time which is so essential in order to consider what is "the same transaction" as the continuity of action and purpose. The carrying out of a successful dacoity, that is to say, successful not only in securing the loot but carrying it off, inevitably involves previous concert and planning; and continuity of action in carrying out the joint purpose can be said to continue until the stolen property has been successfully got away to the place of concealment. Where the dacoits are intercepted while still returning home with their booty and some of them being arrested with the booty, they are rescued, not by friends or sympathisers from their village, but by others of their number, who are returning behind them and who also have not reached home, in such a case from the time the dacoits set out on their expedition until they get safely home with their booty, everything done by the dacoits, which is directed towards the successful completion of the crime, the getting away of the culprits, and the concealment of the booty, can fairly be described as part of the same transaction: ('40) 27 A.I.R. 1940 Pat. 499; ('45) 32 A.I.R. 1945 Pat. 388; 29 Cal. 385 and ('30) 17 A. I. R. 1930 Pat. 159, *Disting.*; ('38) 25 A.I.R. 1938 P.C. 130; 4 Bom. L. R. 789 and 30 Bom. 49, *Rel. on.*

[P 43 C 1; P 44 C 2; P 46 C 1, 2]

As to whether persons can be tried together at one trial and as to whether different charges can be framed against accused persons in one trial depends upon the accusation made by the prosecution, and not the result of the prosecution.

[P 43 C 1]

(b) Bihar and Orissa Village Administration Act (3 [III] of 1922), S. 27 (d)—When chaukidar can arrest explained.

Section 27 (d) does not state that in fact stolen property must be found in the possession of a person before he can be arrested by a chaukidar. What it requires is that any person found in possession of anything which may reasonably be suspected to be stolen property, or a person who may reasonably be suspected of having committed an offence with reference to such thing is liable to be arrested by a chaukidar, [P 45 C 2]

M. K. Mukherjee, Baldeva Sahay and K. K. Sinha — for Appellants (in Nos. 36 and 37 respectively).

Yasin Yunus, for Govt. Advocate — for the Crown.

Imam J.—In these two appeals there are nine appellants, who have been sentenced to various terms of imprisonment for offences under Ss. 395, 225, 225B and 412, Penal Code, the details of which will be stated when the case of each appellant is considered. The Sessions Judge of Monghyr tried the appellants with the aid of assessors, who found some of the appellants guilty of the charges framed against them. According to the prosecution case, some time between 11 P. M. on the night of 29th June 1943, and 1 A. M. of 30th June 1943, a dacoity was committed in village Kasimpur, within the jurisdiction of police-station Khagaria, in the houses of Dip Narain Mahton and Dina Nath Mahton, the houses of these two persons being 500 yards apart. It is said that about 30 to 35 men first went to the house of Dip Narain Mahton, where they looted his valuables after breaking open the main door. Dip Narain, who was sleeping, managed to climb up on to a platform of bamboos in the room from which place he asserted he was able to identify the dacoits. On an alarm a number of villagers assembled and Tilo Sao Chaukidar came to the spot, where he set fire to a small thatched hut adjacent to Dip Narain's house. In consequence there was much light, and the villagers are said to have identified some of the dacoits as a result of it. Thereafter the dacoits went to the house of Dina Nath Mahton, who was sleeping with his *bhagna* Kamleshwari. The dacoits struck Kamleshwari with a *bhala*, and proceeded to loot Dina Nath's valuables. Thereafter the dacoits decamped with the booty. On 30th June 1943, Dip Narain Mahton, Dina Nath Mahton and Tilo Sao chaukidar proceeded to Khagaria police-station, three miles away, where Dip Narain lodged a first information report at 8 A. M. Of the appellants, Hirday Singh was definitely named as one of the dacoits in that report. The Sub-Inspector of Khagaria after having recorded Dip Narain's statement proceeded to the village to investigate the case. There can be no doubt from the evidence of the Sub-Inspector and other evidence on the record that a dacoity took place in the houses of Dip Narain Mahton and Dina Nath Mahton. Indeed it was not seriously contended before us that there was no dacoity in the houses of these two men, but quite independent of that consideration I am fully

satisfied, after an examination of the evidence, that in fact a dacoity was committed in the houses of these two men, and it is unnecessary for me to recapitulate the evidence witness by witness as to this.

While there was a dacoity in the houses of Dip Narain Mahton and Dina Nath Mahton at Kasimpur on the night of 29th June, it appears that Ramdhani chaukidar of Baburahi was fairly active on the evening of 29th June, as his suspicions were aroused on seeing the appellants Bhadai Singh, Hirday Singh and others talking together in a bamboo clump to the west of the village Sibchandpur. He had also seen one Tili Singh, who was convicted by the Sessions Judge but is not a party to these appeals, at the house of Bhadai Singh. Ramdhani chaukidar returned to Sabdalpur, at 7 P. M. when he saw a collection of persons at the house of Bhadai Singh. Amongst them he recognised Bhadai Singh himself, Basudeo Singh, Sahadeo Singh, Pabirath Gope, Hirday Singh and one Barhamdeo Singh. Ramdhani chaukidar then returned to his own village, where he called out to his nephew Baso Dusadh chaukidar, and returned with him to Sabdalpur, somewhere about 11 P. M. Ramdhani and Baso then went to the houses of the above-mentioned individuals, and found them absent. Ramdhani chaukidar then took the assistance of Sibdhari Dusadh chaukidar (P. W. 4) and Rambhajju Kandu chaukidar (P. W. 5), and proceeded to Saheb-pur Kamal railway station, three miles away, from where he sent a wire through the Assistant Station Master to the Sub-Inspector of Ballia to the effect that the bad characters of his village were absent and had probably gone to commit dacoity. At that time Ramdhani suspected that the dacoity would take place at village Bishunpur. Ramdhani, Baso Dusadh, Sibdhari Dusadh and Rambhajju Kandu then went to village Kurha, and asked Sipahi Kandu and Kutamal Gope chaukidar of that place to accompany them in order to do picketing west of Acheychak and east of Kalyanpur *dhala*, as they anticipated that the dacoits would return by that route. Ramdhani, it appears, then went to village Acheychak, woke up a number of persons and sought their assistance in apprehending these bad characters who were absent from the village. About dawn, Ramdhani went to village Sabdalpur in order to see if the suspected persons had returned. He found that they had not yet returned. While he was in Sabdalpur he heard an outcry from the direction

of the spot where the chaukidars were picketing. From the evidence it appears that the chaukidars who were picketing had seen some men coming towards Sabdalpur from the west. As Ramdhani approached the spot he met one Bhikari whom the chaukidar seized. Bhikari was, however, able to get away, as his brother one Lachmi had come to his help in the meantime. In the meanwhile one Adua Singh and the appellants Basudeo and Sahdeo had been caught by the other chaukidars.

It is said that these men were carrying bundles containing clothes and ornaments. The arrested men and the chaukidars were then proceeding towards Sahebpur Kamal. After they had proceeded a short distance, the arrested men cried for help, upon which the appellants Bhadai Singh, Pabirat Gope, Ramkishun and others came armed with weapons, such as lathis and bhalas. They assaulted the chaukidars, and released the three arrested men. The bundles which had been taken possession of from the arrested men Basudeo and Sahdeo were taken by the chaukidars Baso Dusadh and Kutahal Gope to the house of one Dorik Singh of village Kalyanpur. The bundles were found subsequently to contain a large number of ornaments and clothes. Ramdhani chaukidar and Rambhajju chaukidar proceeded from Dorik Singh's house to Sahebpur Kamal railway station and as they approached the station they saw Tilo Singh running with a bundle and an earthen pot containing ghee. Jugeshwar Mahton (P. W. 30) caught this individual Tilo near the railway crossing. Tilo was then taken under arrest to Sahebpur Kamal railway station. The Assistant Sub-Inspector of police-station Ballia, Naresh Jha, arrived at Sahebpur Kamal railway station at 8 A. M., when he took charge of Tilo Singh and the articles seized from him. It would appear that this Assistant Sub-Inspector had reached the spot as a result of a telephonic message being sent to the police-station Ballia, which was received at 7 A. M., as will appear from the station diary entry (Ex. 8). According to the evidence of this Assistant Sub-Inspector, he recorded the statements of the chaukidars on that day. I have read the evidence of the chaukidars with special care to see that there was no scope for coming to any conclusion which would make one suppose that these witnesses were putting forward a concocted story. There can be no doubt whatever that the telegraphic and telephonic messages, which were sent from the railway

station, make it clear that a dacoity was apprehended somewhere and according to the suspicions of the chaukidar perhaps at Bishunpur. The police had accordingly despatched a force to Bishunpur, but they returned at 6 A. M. to state that nothing had taken place there. On receiving the message at 7 A. M. the Sub-Inspector of Ballia sent this Assistant Sub-Inspector and a force. There is no reason to doubt the station diary entries in this respect, nor is there any ground for holding that the telegraphic and telephonic messages were bogus. When the Assistant Sub-Inspector arrived, he in fact found Tilo Singh under arrest with a bundle and a pot of ghee recovered from his person. He proceeded to record the statements of the chaukidars. I have not the slightest hesitation in accepting the evidence of the chaukidars that they were looking out for certain persons suspected to have gone out for committing dacoity, and that while they waited to intercept them on their return they arrested certain individuals who were subsequently rescued from their custody. It is noteworthy that while these chaukidars were performing their duty near Sabdalpur they had not the slightest idea that anything like a dacoity was being committed at Kasimpur in the jurisdiction of Khagaria police-station. It was only when Tilo Singh was arrested near Sahebpur Kamal railway station that it emerged for the first time that a dacoity had been committed at Kasimpur.

The Sub-Inspector of Khagaria, who had proceeded to Kasimpur for investigation of the dacoity, had no information as to what was happening at Sabdalpur, until at a subsequent stage in the investigation when he received the statements of the chaukidars recorded by the Assistant Sub-Inspector of Ballia. It is a significant circumstance in this case that the police authorities of Khagaria and Ballia were conducting their investigation quite independent of each other and in ignorance of what was happening in the course of their respective investigations at the earlier stages. The Assistant Sub-Inspector of Ballia proceeded to the house of Dorik Singh (P. W. 8) from where he recovered the two bundles said to be in the possession of Sahdeo and Basudeo. According to his evidence, these bundles contained ornaments, and he specifically refers in his evidence to the exhibits while stating that they were in these bundles. He, however, mixed up the contents of the two bundles, and prepared a seizure list. Subsequently the house of one Baijnath Singh was

searched, and a large number of ornaments were recovered from there. Baijnath Singh was discharged by the committing Magistrate, and we are not concerned now with the question as to what were the ornaments which were recovered from his house. It seems, however, that there was no opportunity then, as far as one can gather from the evidence, for the police authorities of Ballia to consult the police authorities of Khagaria as to how the investigation should proceed, nor is there any indication that the police authorities of Khagaria were in collusion with the police authorities of Ballia. This is to be borne in mind in view of the statements made on behalf of Bhola Singh.

An important point of law has been raised by Mr. Baldeva Sahay on behalf of the appellants to the effect that the trial was invalid owing to misjoinder of charges and misjoinder of trials. He urged that the incident near Sabdalpur, in which certain persons participated in rescuing Sahdeo and Basudeo from the custody of the chaukidars, was quite independent of the dacoity committed in the houses of Dip Narain Mahton and Dina Nath Mahton in village Kasimpur. He emphasised that the dacoity at Kasimpur was a completed transaction the moment the dacoits made good their escape from the village. In any subsequent incident, if any of the appellants participated, it could not reasonably be said that that incident formed part of the same transaction as the dacoity at Kasimpur. He further drew attention to the evidence in the case that one Tilo Singh, who had been tried along with the appellants, was arrested by the chaukidars near Sahelpur Kamal railway station, who made a statement to the chaukidars to the effect that the articles in his possession were his share of the booty taken from village Kasimpur. He argued that this clearly indicated that after the dacoity the dacoits had divided the loot, and so far as they were concerned the incident of the dacoity was at an end. It could not fairly be said that Tilo Singh could be tried along with the others for the offences under S. 225, Penal Code. As to what is the same transaction must depend upon the facts and the circumstances of each particular case. This proposition is recognized throughout the Courts in India. As to whether persons can be tried together at one trial and as to whether different charges can be framed against accused persons in one trial depends upon the accusation made by the prosecution, and not the result of the prosecution. It has been so

held in 65 I. A. 158¹ by their Lordships of the Judicial Committee. All the accused persons at the trial before the Court below were charged with the offence of dacoity at the houses of Dip Narain Mahton and Dina Nath Mahton in village Kasimpur. This was the accusation. It is immaterial that some of the accused persons were acquitted of that charge. The accusation, therefore, was that the accused on trial had acted in concert when they committed dacoity at village Kasimpur. Indeed, on the evidence of Ramdhani chaukidar it is abundantly clear that some of the appellants were seen by him in suspicious circumstances and association together before the dacoity, and it would be a safe inference to draw from their subsequent absence from their homes and their return towards Sabdalpur early in the morning, that these men had been not only acting in concert but had been associating from the time they started towards Kasimpur until they finally dispersed after rescuing Basudeo and Sahdeo from the custody of the chaukidars. The following passage from the judgment of the Judicial Committee of the Privy Council in 65 I. A. 158¹ I would like to quote. Their Lordships said :

"Whatever scope of connotation may be included in the words 'the same transaction', it is enough for the present case to say that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concern and agreement which constitute the conspiracy serve to unify the acts done in pursuance of it."

There can be no doubt that when a body of persons proceeds to commit a dacoity it must be the result of a conspiracy, and their action though individual in many respects is the result of their pre-determined intention. In other words, the whole body of men out to commit dacoity is acting in concert, though its members may individually be committing various overt acts. I think it would not be an unfair supposition to say that when men decide to commit dacoity they not only decide to break into another man's house and deprive him of his goods but also to carry away successfully the same and, if necessary, to prevent their own capture and recovery of the property so looted. A decision of this Court in A.I.R.

1. (38) 25 A. I. R. 1938 P. C. 130 : 32 S. L. R. 476 : I. L. R. (1938) 2 Cal. 295 : 65 I. A. 158 : 174 I.C. 1 (P.C.), Babulal Choukhani v. Emperor.

1930 Pat. 159² was placed before us, where it was held that persons uprooting crops of a field when captured by the owners cannot be jointly tried along with persons who rescued them from the custody of the owners who had arrested the thieves, unless there was evidence that the rescuers had been in collusion with the thieves and had stood by with the object of effecting the rescue. On the facts of that case there can be no doubt that this Court upheld the objection as to misjoinder, but I would none the less quote a certain passage from the judgment. Their Lordships say :

"Had there been evidence that the rescuers had been in collusion with the thieves committing the theft and had stood by with the object of effecting a rescue, then there would have been such a connexion between the two sets of offences as to make them one and the same transaction, and that would have justified the trial of the two sets of offences together; but in this case there is no trace of any such connexion."

The evidence on the record in these appeals clearly shows that the rescuers came from the north-west, they had no bundles but they were following the men whom the chaukidars had arrested. On the facts of the case before us there is ample justification to come to the finding that there is evidence of connexion between the two incidents. Many of the persons who have been charged with the rescue of the arrested men were themselves charged with having committed the offence of dacoity, and it is also significant that many of them were seen in the house of Bhadai Singh previous to the dacoity, absent from their homes at night, and then seen in close proximity to one another in the morning when returning to Sabdalpur. According to the evidence, the arrested men had in their possession ornaments which Dina Nath and Dip Narain identified as ornaments belonging to them which had been stolen at the dacoity. In addition, many of these men had been identified at the dacoity itself. The circumstantial evidence from all this leads to the conclusion that these men had not only intended to commit dacoity but to dispose of them effectively and prevent themselves being captured. There is a decision of the Bombay High Court in 4 Bom. L. R. 789,³ which I would refer to. In that case a gang of men proceeded to a certain village in order to commit dacoity, but as it was still daylight they concealed themselves in a secluded *nala*, and while so concealing themselves a woman came there

to collect some vegetable. These men fearing detection fell upon the unfortunate woman, and stoned her to death. Thereafter they committed the dacoity. The Sessions Judge tried some of the accused for the murder of the woman, and all the accused for the dacoity at one trial. The objection as to misjoinder was negatived by the Bombay High Court, and the trial was held to be a valid one. It was argued by Mr. Baldeva Sahay, however, that the act of murder in the Bombay case was committed by the gang while on their way to commit a dacoity and, therefore, it might well be said that it formed part of the same transaction, for it was an act which was in furtherance of the common intention to commit dacoity, as the gang did not wish the woman to give them away. I would, however, point out this significant passage in the judgment of the Bombay High Court, where their Lordships said :

"It would be exactly the same thing if, after having secured their plunder in committing dacoity, they were encountered by any resistance in making their escape with the stolen property and in order to overcome such resistance and to carry away the stolen property committed murder for that end."

In other words, as I understand this passage, those who would be committing murder when the dacoits were effecting their escape with the stolen property in order to overcome any resistance in carrying away the stolen property, could be tried along with those who had committed the dacoity. It seems to me that the fact that Sahdeo and Basudeo were arrested near Sabdalpur, nearly seven miles away from Kasimpur, is quite beside the point. It is not the distance nor the proximity of time which is so essential in order to consider what is "the same transaction," as the continuity of action and purpose. It is quite obvious that the dacoits were returning from the scene of dacoity, and they resisted the attempt made by the chaukidars to take any one of them with the stolen property on them, and I think such an act must be regarded as one which was in furtherance of the purpose of the dacoits, namely, effectively to carry away the looted property and escape arrest. Another case, which has been referred to with approval not only in this Court but also in the Privy Council is 30 Bom. 49.⁴ This was a case of misappropriation of money of a trust fund, but their Lordships of the Bombay High Court have considered the word "transaction" and have held that with reference to S. 215, (*sic.* S. 235 ?)

2. ('30) 17 A. I. R. 1930 Pat. 159 : 127 I. C. 571, Raghu Dusadh v. Emperor.

3. ('02) 4 Bom. L. R. 789, Emperor v. Punya Naika.

4. ('06) 30 Bom. 49, Emperor v. Datto Hanmant.

"the phrase is used in a connection which implies that there may be a series of acts - illust. (f) to that section indicates that the successive acts may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In S. 239, therefore, a series of acts separated by intervals of time are not, we think, excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial, even if incidentally one of those jointly tried has done an act for which the other may not be responsible."

They further went on to say :

"that the accused carried out their scheme by successive acts done at intervals, alternately taking the benefits, does not prevent the unity of the project from constituting the series of acts one transaction i. e., the carrying through of the same object which both had from the first act to the last."

and I would hold on the facts of the case before us that from the first act to the last, namely, the journey to the place of dacoity and to make the expedition successful it was essential for the miscreants to get away with the looted property and escape detection. I think in the circumstances one would be justified in holding that the incident of the rescue near village Sabdalpur was part of the same transaction as the dacoity at Kasimpur. The entire circumstances indicate continuity at action and purpose of the dacoits. No one was tried at this trial who was not alleged to have been amongst the dacoits. It is further to be remembered that although the accused would be entitled to raise any legal point as to misjoinder and this Court would have to give effect to it if valid still in this case it seems to me that even if no charges for the rescue incident had been framed the evidence led in the case with reference to that incident would have been most relevant as evidence of corroboration of the evidence of identification at the dacoity itself. It would have been also relevant as evidence of conduct and circumstantial evidence from which certain inferences could fairly be drawn against the accused persons. In any event, this case cannot be said to be one in which any prejudice whatever has been caused to the accused by the joinder of the charges. Having regard to the view which I take it would be unnecessary for me to refer to the recent decisions of this Court in A. I. R. 1940 Pat. 499⁵ and 24 Pat. 303,⁶ as I am satisfied that on the facts this case is dis-

tinguishable from the facts reported in these decisions. I can find nowhere any suggestion in these decisions which could be said to prohibit one from coming to the conclusion on the facts of a particular case as to what is and what is not the same transaction. I would accordingly hold that the objection as to misjoinder is not valid, and that there has been no breach of the provisions of Ss. 235 and 239, Criminal P. C.

Mr. Mukherjee also advanced a point of law. He urged that if it was found that Sahdeo and Basudeo had in fact no stolen properties on them, then the chaukidars had no authority to arrest them and consequently their rescue could not be said to be a rescue from lawful custody. Section 27, Village Administration Act, cl. (d) provides that

"a chaukidar shall arrest any person in whose possession anything is found which may reasonably be suspected to be stolen property, or who may reasonably be suspected of having committed an offence with reference to such thing."

It will be observed that this section does not state that in fact stolen property must be found in the possession of a person before he can be arrested by a chaukidar. What it requires is that any person found in possession of anything which may reasonably be suspected to be stolen property, or a person who may reasonably be suspected of having committed an offence with reference to such thing is liable to be arrested by a chaukidar. Can any one doubt in this case that Ramdhani chaukidar and his companions, the other chaukidars, were all acting with the fullest convictions in their minds that a dacoity was about to be committed that night owing to the absence of these men suspected to be bad characters from their homes? The chaukidars went out of their way to give reasonable warning in the village and picket the road leading into the village. When they saw men coming with bundles, the very men whom they suspected to be out for committing a dacoity, I think it was reasonable for these chaukidars to suspect that they were in possession of stolen property. Furthermore the two victims of the dacoity, Dip Narain and Dina Nath, both have identified some of the properties, which were recovered from the bundles in the possession of Basudeo and Sahdeo, to be articles taken away by the dacoits from their houses. I am satisfied not only that it was reasonable for the chaukidars to suspect that these men were in possession of stolen property, but I would go further in saying that I see no justifiable

5. (140) 27 A. I. R. 1940 Pat 499 : 187 I. C. 361, Nathu Chaudhury v. Emperor.

6. (145) 32 A. I. R. 1945 Pat. 388 : 24 Pat. 303, Chintaman v. Emperor.

ground for rejecting the evidence of Dip Narain and Dina Nath that some of the ornaments recovered from the bundles were their property. I must conclude, therefore, that the chaukidars acted fully within the powers given to them under S. 27, Village Administration Act, and that the arrest was valid and that the rescue was from lawful custody.

In taking up the cases of the individual accused, it is necessary to state that appellants Bhola Singh and Bhadai Singh were represented by Mr. Baldeva Sahay, and appellants Sahdeo Singh and Basudeo Singh were represented by Mr. K. K. Sinha, and the rest of the appellants were represented by Mr. M. K. Mukherjee. (His Lordship then considered the individual cases of the accused and concluded.) In the net result, the appeal of Firangi Singh, Ramkishun Gope and Pabirat Gope is allowed, and they are acquitted. The appeals of the rest of the appellants are dismissed.

Meredith J. — I agree. Upon the question of misjoinder I am of opinion that the present case can be distinguished from *Nathu Chaudhury v. Emperor* (A.I.R. 1940 Pat. 499)⁵ and *Chintaman v. Emperor* (24 Pat. 303),⁶ to which decisions I was a party. The determining factor in cases of this kind in deciding whether the different offences committed by different persons all form part of the same transaction is, I think, the presence of concert and continuity of action. In the cases to which I have referred it was held upon the facts that no concert had been established between the different offenders, and no continuity of purpose as between the different offences. In the present instance, however, the facts alleged by the prosecution involve, to my mind, both concert and continuity of action, and, therefore, S. 239 (d), Criminal P. C., is applicable. The carrying out of a successful dacoity, that is to say, successful not only in securing the loot but carrying it off, inevitably involves previous concert and planning; and continuity of action in carrying out the joint purpose can be said to continue until the stolen property has been successfully got away to the place of concealment. In the case before us the dacoits were intercepted while still returning home with their booty. Some were arrested with the booty, and they were rescued, not by friends or sympathisers from their village, but by others of their number, who were returning behind them and who also had not yet reached home. In my judgment, from

the time they set out on their expedition until they get safely home with their booty, everything done by the dacoits, which is directed towards the successful completion of the crime, the getting away of the culprits, and the concealment of the booty, may fairly be described as part of the same transaction. Suppose, as sometimes happens, one of the dacoits had been knocked down and captured by the villagers at the scene of the dacoity and some of his fleeing comrades had turned back and rescued him and carried him off with them, could any one maintain that that was not part of the same transaction? Such a case can be distinguished from a case like the present, where the arrest and rescue were effected nearer home, only in degree and not in kind. Had the rescue been not by some of the dacoits themselves but by other persons acting independently, the matter would have been different. That is where the present case is distinguishable from such cases as *Gobind Koeri v. Emperor* (29 Cal. 385)⁷ and *Raghu Dusadh v. Emperor* (A. I. R. 1930 Pat. 159).²

But, it is said, how can the case of Tilo Singh who was arrested independently at a different place while making off separately, and who could not have known anything about the arrest and rescue, possibly be tried together with the cases of the dacoits who took part in the rescue? There is no room for concert and continuity of action between him and them. The argument, I think, misconceives the meaning of S. 239 (d). That provision enables persons to be charged and tried together who are accused of different offences committed in the course of the same transaction. If circumstances are present which support a finding that the offences were committed in the course of the same transaction, then the circumstance that some of the first offenders may have become completely dissociated from the others before the subsequent offence is clearly irrelevant upon the wording of the section. What we have to ask ourselves is merely whether there was continuity of purpose and action on the part of the dacoits who took part in the dacoity and in the rescue of their comrades on the way home. If once this is found, then the fact that he took part in the dacoity will bring in a man like Tilo Singh irrespective of what he himself may have subsequently done. The section, of course, does not make him in any way responsible for the rescue,

7. ('02) 29 Cal. 385.

but it does make him liable to be jointly tried with the rescuers. The question is not whether Tilo Singh was connected with the rest by any continuity of purpose at the time of the rescue, but merely whether the rescue and the dacoity were part of the same transaction. In other words, was the rescue in furtherance of the intention with which the dacoits set out? In *Emperor v. Datto Hanmant Shahapurkar* (30 Bom. 49)⁴ it was observed:

"If the accused started together for the same goal this suffices to justify the joint trial even if incidentally one of those jointly tried has done an act for which the others may not be responsible." This decision has been approved by the Privy Council in *Babulal Choukhani v. Emperor* (65 I. A. 158).¹

Had I felt compelled to hold that the present joint trial was vitiated by misjoinder I would have done so with the utmost reluctance, because there has been no question of prejudice of any sort. Had the charges under S. 225 not been tried at this trial, the evidence in connexion with the arrest and rescue would still have been admissible, and highly relevant as corroborating the evidence of identification of the dacoits. Indeed it has not been argued before us that there was any possibility of prejudice, or that the trial was in any way unfair. It seems to me highly anomalous that where a lengthy and expensive trial has taken place and has been admittedly fair in every way, the whole should have to go for nothing and the parties and witnesses become involved in the expense and harassment of a new trial merely because of a formal defect of misjoinder. That, however, is the manner in which the Courts in India have interpreted the Privy Council decision in *Subrahmaniam Iyer's case* (28 I.A. 257).⁸ I for one hope, in view of the observations of the Privy Council at p. 174 in *Babulal Choukhani's case* (65 I. A. 158),¹ that when a suitable occasion arises the Privy Council will explain *Subrahmaniam's case*⁸ for us; but, unless and until that happens, we are undoubtedly bound by the interpretation of that decision, *cursus curiæ* in this country having become established.

R.K./V.S.

Order accordingly.

8. ('02) 25 Mad. 61 : 28 I. A. 257 : 8 Sar. 160 (P.C.), *Subrahmaniam Iyer v. Emperor*.

[Case No. 14.]

A. I. R. (33) 1946 Patna 47

MANOHAR LALL AND DAS JJ.

Sita Ram Sahu — Appellant

v.

Lachmi Narain Sah and others —

Respondents.

Appeal No. 164 of 1944, Decided on 27th July 1945, from original order of Sub-Judge, Darbhanga, D/- 12th May 1944.

(a) Civil P. C. (1908), O. 39, Rr. 1 and 2 (3); — Injunction issued under R. 1 disobeyed — R. 2 (3) applies — S. 36 or O. 21, R. 32 has no application.

Order 39, Rules 1 and 2 must be read together. Hence R. 2 (3) applies to disobedience generally if an injunction is granted by the Court. The words "in case of disobedience" of that clause are wide enough to cover breaches of injunctions issued under O. 39, R. 1. Neither S. 36 nor O. 21, R. 32 applies: ('36) 23 A.I.R. 1936 Pat. 23, *Foll.*; ('41) 28 A.I.R. 1941 All. 140, *Disting.* [P 49 C 1]

(b) Interpretation of statutes — All parts of statute should be harmoniously construed.

It is an ordinary principle of interpretation of statutes that all the parts of the statute should be so construed so that they do not run counter to each other and so that the very object of the enactment is not frustrated. [P 49 C 2]

(c) Civil P. C. (1908), O. 39, R. 2 (3)—Injunction — Aggrieved party must obey till it is set aside by that Court or suspended by another Court.

When an injunction order has been issued, whether it is right or wrong, it must be obeyed. The only remedy of the aggrieved party is to come up in appeal to a superior Court to have the order vacated. So long as the order stands and its operation has not been suspended by another Court or by the Court which passed the order itself, it will not be tolerated that the litigants would disobey that order. [P 50 C 1]

Mrs. Dharamshilla Lal — for Appellant.

K. N. Lal — for Respondents.

Manohar Lall J.—This is an appeal by defendant 2, Sita Ram, who has been ordered to be put into civil jail in that he deliberately disobeyed the injunction order issued by the learned Subordinate Judge in connexion with a partition suit pending before him in the following circumstances. On 15th November 1943, the plaintiffs, who are the minor sons of defendant 1, and plaintiff 3 filed a petition supported by an affidavit that they apprehended that the defendants would remove the crops standing on the land and if they removed them the plaintiffs would be put to great loss and inconvenience and they prayed that a pleader commissioner be appointed with direction to proceed at once to make an estimate of the probable produce. The contesting defendants other than defendant 1, who is the father of the plaintiffs, as I have just stated, are the step-brothers of plaintiffs 1

and 2. On 26th November 1943, the plaintiffs put another petition stating that defendant 1 is an old man and is under the clutches of defendants 2 and 3 who are putting all sorts of difficulties in the way of the plaintiffs and have stopped all rations and expenses and therefore they prayed that the commissioner be directed to get the paddy crops harvested and thrashed and to deposit the same in Court so that there may be no difficulty to the plaintiffs to get their share of the produce, otherwise they will starve. A few days later on 30th November the plaintiffs filed another petition stating that it is apprehended that the defendants will cut away the standing paddy crops and prayed that injunction be issued restraining the defendants from cutting the paddy crops until further orders. After hearing the plaintiffs the Court was satisfied that as the season for cutting the paddy crops had already come it was necessary to restrain the defendants from cutting paddy until further orders were passed by the Court. Accordingly he issued an injunction restraining the defendants from cutting paddy until further orders of the Court. This injunction order was served upon the defendants on 3rd December 1943. Thereafter the plaintiffs put another application on 14th December 1943, stating that notwithstanding the issue of the injunction order the defendants have reaped the crops of 8 bighas of land situated in one place. On 16th December 1943, defendants 2 to 4 put in a petition stating that they are ready to offer security to the extent of the value of the share claimed by the plaintiffs and prayed that the produce be released on taking security from them. On 17th December, the learned Subordinate Judge after hearing the parties thought that it was just and proper to allow the defendants to take the whole of the produce if they gave security of Rs. 1000 for the plaintiffs' share and Rs. 300 for the share of defendant 1 and ordered that after executing the security bonds the defendants could take the whole of the produce. On subsequent dates the proposed draft was approved by the learned Subordinate Judge and he directed that the duly executed document should be filed by the defendants by 22nd December 1943. On that date the security bond was not filed by the defendants, but on the other hand the plaintiffs filed a petition stating that the defendants have cut away all the crops standing on all the areas, that is to say from 8 bighas they had already cut as stated in the earlier petition which has been referred

to by me and from the other areas between 19th and 20th December, and, therefore, it was prayed that defendants 2 and 3 having deliberately disobeyed the orders of the Court should be proceeded against in accordance with law. The Court by Order No. 24 states that the execution of the bond now is not necessary when the paddy has been stated to have been cut away. On 15th January 1944, having heard the plaintiffs the Court was satisfied that a *prima facie* case for disobeying the order of injunction and contempt of Court had been established and therefore he directed the defendants to come and show cause. On 14th March 1944, the plaintiffs put in another petition supported by an affidavit that the rabi crops are ready for harvesting and the defendants are making endeavour to harvest the same and, therefore, they prayed that this produce, i.e., the potatoes, etc., should be attached by the Court and the defendants should be restrained from harvesting them. The Court issued an interim injunction restraining the defendants from harvesting this produce.

Defendants 2 to 4 put in a number of petitions challenging the correctness of the statements made on behalf of the plaintiffs and suggested that it was defendant 1 himself who in collusion with the plaintiffs had removed the paddy produce and that the allegations against the defendants were false. It was also suggested that defendant 2 was in Darbhanga on the dates on which the crops were said to have been removed and defendant 3 was in Nepal. The parties adduced oral evidence in support of their contentions. The plaintiffs examined six witnesses, and the defendants examined five witnesses. Defendant 1 stated in his petition that it has been falsely stated by the defendants that he removed any of the crops in collusion with the plaintiffs. The learned Subordinate Judge on a consideration of the entire evidence upon the record has believed the case of the plaintiffs and has disbelieved the case set up by the defendants. He has come to a clear finding that the crops were removed by the defendant Sita Ram in violation of the order of injunction issued by the Subordinate Judge which had been served upon him. Having regard to the nature of the disobedience the learned Subordinate Judge directed that Sita Ram should be put in civil prison under O. 39, R. 2(3), Civil P. C., for a period of three weeks. Hence the appeal to this Court.

Mrs. Dharamshila Lal in support of the appeal raised an important question of law

in that she suggested that as the order of injunction was passed under O. 39, R. 1, the disobedience of that order can never be punished under O. 39, R. 2 (3). A Division Bench decision of this Court in 15 Pat. 320¹ is directly in point and is against the contention raised by the learned counsel. In that case it is clearly decided that O. 39, R. 2 (3) applies to disobedience generally if an injunction is granted by the Court and the words "in case of disobedience" of that clause are wide enough to cover breaches of injunctions issued under O. 39, Rule 1. A number of cases were examined by this Court in that decision and the case in A.I.R. 1930 ALL. 387,² was dissented from. The learned Judges also made an observation in the judgment that it would appear desirable to redraft R. 2 perhaps by replacing R. 2 (3) with such modifications as may be required by a new R. 2A. It is regrettable that notwithstanding that observation the rule has not been redrafted. We would like to endorse the observation made by the learned Judges in that case and would direct that the papers be placed before the Hon'ble the Chief Justice so that if he thinks fit suitable action may be taken in the matter.

The learned counsel for the appellant drew our attention to the case of the Allahabad High Court in A.I.R. 1941 ALL. 140³ in support of the contention that disobedience of an order under O. 39, R. 1 cannot be punished under O. 39, R. 2. In the course of the argument I asked the learned counsel to point out any other provision of law under which disobedience of an order under O. 39, R. 1 could be punished. The learned counsel suggested that the remedy was under O. 21, R. 32, Civil P. C. She also drew our attention to s. 36, Civil P. C. But in my opinion none of these provisions of law has any relevancy. If the order passed by the Subordinate Judge under O. 39, R. 1 has been disobeyed, there is nothing further which can be done by the executing Court. Therefore, it seems to me that the only solution of the problem is that if the order of the learned Subordinate Judge under O. 39, R. 1 has been disobeyed, it must be punished under O. 39, R. 2 (3). The two rules must be read together, and it is an ordinary principle of interpretation of statutes that all

the parts of the statute should be so construed so that they do not run counter to each other and so that the very object of the enactment is not frustrated. If the argument of the learned counsel was accepted every litigant would be free to disobey an order of injunction obtained under O. 39, R. 1. That could not be the meaning of the provisions and the Legislature, in my opinion, when they provided a remedy by inserting R. 2 (3) intended to cover cases under O. 39, R. 1 also. It is unnecessary for me to consider the correctness of the decision of the Allahabad High Court, but it is enough to state that the circumstances which arose for consideration in that case were entirely different, and in any event we are conclusively bound by the Division Bench decision of this Court. I would accordingly overrule the first contention.

The learned counsel then took us through the entire oral evidence in the case. Her chief comment was that in the evidence of the plaintiffs' witnesses no date has been stated as to when either of the crops, that is to say crops from the eight bighas and the crops from the other area in village Potga, was removed. On a perusal of the evidence of both sides and the applications filed on behalf of the plaintiffs and the defendants it is clear that it was the admitted case of everybody that the produce had been removed after 3rd December and before 22nd December. I have again perused the evidence of the witnesses on behalf of the defendants. They have stated in some places that the crops were removed on 4th or 5th of Aghan and in some places on a later date. The parties were really at variance on the question as to whether the produce had been removed by defendants 2 and 3 or whether they had been removed by defendant 1. Plaintiffs 2 and 3 are minors and could not possibly join in the removal of the crops. This contention also fails.

The evidence of the plaintiffs' witnesses is of a higher order as has been pointed out by the learned Subordinate Judge, and in particular he places great value on the statement of the daffadar. The evidence of the plaintiffs' witnesses is consistent and in accord with the probabilities of the case and the circumstances disclosed in the various petitions from time to time. Having perused the evidence I am unable to reach any other conclusion than that which was arrived at by the learned Subordinate Judge who had the additional advantage of hearing and seeing the witnesses before him. In my

1. ('36) 23 A.I.R. 1936 Pat. 23 : 15 Pat. 320 : 160 I. C. 347, Jang Bahadur Singh v. Chhabila Koiri.
2. ('30) 17 A.I.R. 1930 All. 387 : 127 I. C. 577, Balbhadar v. Balla.
3. ('41) 28 A.I.R. 1941 All. 140 : I.L.R. (1941) All. 295 : 194 I. C. 166, Janak Nandini Kunwari v. Kedar Narain.

opinion the learned Subordinate Judge's view must be affirmed. I would, therefore, dismiss this appeal.

It was suggested that the punishment ordered by the learned Subordinate Judge was somewhat severe, but having regard to the manner in which the defendants were bent upon harassing the plaintiffs I am unable to take a lenient view of the matter. Litigants ought to realise that when an injunction order is issued by a Court it must be obeyed even though the order may be wrong. In one place it was suggested that as the defendants themselves were in possession of the land they were the owners thereof and the plaintiffs had no right whatsoever to any share in the crop. But this is a question which is absolutely foreign to the scope of the injunction order. When an injunction order has been issued, whether it is right or wrong, it must be obeyed, and the only remedy of the aggrieved party is to come up in appeal to a superior Court to have the order vacated. So long as the order stands and its operation has not been suspended by another Court or by the Court which passed the order itself, it will not be tolerated that the litigants would disobey that order. I am unable to accede to the prayer that the sentence should be reduced. The result is that the appeal fails and must be dismissed with costs. Hearing fee two gold mohurs.

Das J.—I agree and would like to add a few words. Order 21, R. 32 speaks of a decree for an injunction. I find it rather difficult to understand how an order of injunction passed under O. 39, R. 1, Civil P. C., could be treated as a decree for injunction. If such an order is not a decree for injunction, O. 21, R. 32, Civil P. C., would obviously not apply. I am further of the view that disobedience of an order of injunction passed under O. 39, R. 1, Civil P. C., can be punished by the High Court as a contempt of Court. Under the Contempt of Courts Act the High Court has now power to punish contempts committed in a Court Subordinate to the High Court. The power of the High Court to punish contempts committed in a Subordinate Court does not, however, affect the question of the power of the Court whose order has been disobeyed. The expression "in case of disobedience" occurring in cl. (3) of O. 39, R. 2, Civil P. C., is wide enough to cover all cases of disobedience, and the point is settled, so far as this Court is concerned, by the decision in 15 Pat. 320.¹ I would like to repeat the observations made

in that case to the effect that it would be better to place the matter beyond all doubt by amending R. 2 of O. 39, Civil P. C. The matter may be placed before my Lord the Chief Justice for consideration of the question by the Rule Committee, if he thinks fit.

R.K.

Appeal dismissed.

[Case No. 15.]

A. I. R. (33) 1946 Patna 50

FAZL ALI C. J. AND MANOHAR LALL J.

Commissioner of Income-tax, B. & O.

v.

Darsan Ram and others.

Misc. Judicial Case No. 68 of 1944, Decided on 15th August 1945.

Income-tax Act (1922), S. 3 — Joint family—Karta director of company owned by two families—Remuneration of director is personal income and not of joint family.

Two Hindu undivided families represented by D and C as their kartas owned a private limited company. During the account year a sum of Rs. 9250 was paid to these two persons as director's fees:

Held that the remuneration of the directors were their personal earnings and not the income of the joint Hindu family: ('43) 30 A.I.R. 1943 Pat. 169, *Foll.* [P 51 C 1]

S. N. Dutt — for Petitioner.

Mahabir Prasad and R. J. Bahadur —
for Opposite Party.

Manohar Lall J. — This is a reference under S. 66 (1), Income-tax Act, asking the opinion of the Court upon the following question:

"Whether in the circumstances of the case and on the finding of fact arrived at by the tribunal it can be said that the remuneration of Rs. 9250 received by the director could be said to be the income of the family."

It is necessary to state the facts which have been found out of which the question of law arises. Two Hindu undivided families represented by Darsanram and Chatturam as their kartas owned a limited company known as Chatturam Horilram Ltd. During the previous year a sum of Rs. 9250 was paid to these two persons as director's fees. The contention of the assessee was that this was a lawful deduction in computing their profits for the assessment year. The Department on the other hand took the view that the sum was received by these two persons "by virtue of the family being the sole owners of the company and not because the individuals are working in the capacity of outsiders."

The appellate Assistant Commissioner pointed out in his order that if these sums were received from any other company then the case would have been different, but these are received from the private limited company owned by the two families, and,

therefore, the sums received by them cannot be viewed in any other aspect than the income of the joint family. The appellate tribunal by its order dated 27th July 1945 accepted the contention of the assessee and held:

"The income arising out of the assets of the family is only the dividends and the director's fees are received by any member for services rendered by him to the company. It is personal earning and is not liable to be assessed as the income of the Hindu undivided family to which they belong."

Being dissatisfied the question stated above has been referred to this Court at the instance of the Commissioner. In my opinion upon the facts stated the question formulated above must be answered in favour of the assessee. It was argued by the learned standing counsel that in order to become the directors of the company it was a necessary qualification that a certain number of shares in the company should be held by the directors and that in this case the directors became qualified by reason of the fact that the shares of the joint Hindu family were placed at their disposal. He, therefore, argued that this was a case where the income of the directors arose from the aid of the joint family funds and must in law be treated as the income of the joint Hindu family. I am unable to agree with this contention. The joint family property has not been spent in this case in earning the remuneration of the directors. The dividends that were earned on the shares are still the income of the joint Hindu family. A similar view was taken by me in (1943) 11 I. T. R. 16.¹ It must, therefore, be held that the remuneration of the directors are their personal earnings and not the income of the joint Hindu family. For these reasons I would answer the question in the negative. The assessee is entitled to the costs which I would assess to Rs. 250.

Fazl Ali C. J. — I agree.

R.K.

Reference answered.

1. (43) 30 A.I.R. 1943 Pat. 169 : 22 Pat. 55 : 206 I. C. 609 : (1943) 11 I. T. R. 16, *Indra Singh v. Commr. of Income-tax, B. & O.*

[Case No. 16.]

A. I. R. (33) 1946 Patna 51

MEREDITH AND IMAM JJ.

Gola Ho and others — Petitioners

v.

Emperor.

Criminal Revn. Nos. 256 and 258 of 1945, Decided on 1st May 1945, from Orders of Additional Deputy Commissioner, Singhbhum and Sessions Judge, Manbhum-Singhbhum at Purulia, D/- 10th January and 14th February 1945, respectively.

(a) Forest Act (1927), Ss. 38, 20, 26—Notification No. 4246-VIF-13-R, dated 23-4-1936—Provisions of Forest Act applicable to reserved forests applied by notification to forest lands in Schedule — Sections 22 onwards of Chap. 2 and other sections of Act apply to such forests—S. 26 therefore also applies to them.

Until the conditions mentioned in S. 20, Forest Act, have been fulfilled, a forest cannot be deemed to be a reserved forest and it is only from the date fixed by the notification mentioned in sub-s. (1) of that section that a forest is deemed to be a reserved forest. Hence, where by the Notification, No. 4246-VIF-13-R, dated 23rd April 1936, issued under S. 38 of the Act, the Provincial Government applied to the forest-lands mentioned in the schedule to the notification all the provisions of the Forest Act, which are applicable or may hereafter be extended to apply to the reserved forests belonging to Government in the Singhbhum District, the provisions of the Act which are applicable to reserved forests of Government in the district of Singhbhum are Ss. 22 onwards of Chap. II and other sections of the Act which are applicable to such forests. Section 26 of the Act is therefore applicable to such reserved forests. [P 53 C 2; P 54 C 1, 2]

(b) Forest Act (1927), S. 38—S. 38 is not ultra vires of Government of India Act (1935).

Section 38, Forest Act, does not deprive any owner of any right in property. The section only enables the owner to make an application to the Collector for the purpose of management of his forest-lands or to have applied to such lands all the provisions of the Act. The rights of the owner in the property remain and it is the management of the property alone, which is requested by him to be done by a forest officer. Section 38 of the Act is not ultra vires of the Government of India Act, 1935. [P 55 C 1, 2]

(c) Forest Act (1927), S. 26—Accused merely servants—Fine of Rs. 200 was reduced to Rupees 50.

The sentence of the accused who appear to be merely servants was reduced from a fine of Rs. 200 to a fine of Rs. 50 each. [P 55 C 2]

S. Safdar Imam and S. De (in No. 256) and P. R. Das, S. De and A. C. Mitra (in No. 258) — for Petitioners.

Standing Counsel — for the Crown (in both).

Imam J. — These two applications in revision have been heard together as the principal point of law involved has been the same, although the convictions arise out of two different trials in respect of two different incidents. In Criminal Revision No. 256 the petitioner Gola Ho is an employee of one Tarachand Agarwala. He was convicted for an offence under S. 26, cl. (g), Forest Act, read with S. 109, Penal Code. It is said that on 18th May 1944, about 4 P. M. Gola Ho was found along with others purchasing and collecting Kendu leaves from female labourers which the latter had removed from blocks II and V of Darkada and Padampur reserved forest of the Porahat division. These Kendu leaves

totalled 3100 bundles, and they are used principally for the manufacture of biri. The female labourers made a statement as to how they came to be collecting these leaves. They were subsequently examined at the trial of Gola Ho and others, and from their evidence it transpired that they had done so at the instigation of Gola Ho.

In Criminal Revision No. 258 there are four petitioners, namely, Tarachand Agarwala, Bholanath Mundari, Pandeu Mundari and Gonde Gulia. Tarachand Agarwala was sentenced to a fine of Rs. 200, in default to undergo rigorous imprisonment for one and a half-month under S. 26 (g), Forest Act, read with S. 109, Penal Code. The other petitioners were also sentenced to a fine of Rs. 200 each, in default to undergo rigorous imprisonment for one and a half-month under S. 26 (g), Forest Act. It is said that these petitioners were found, on 19th May 1944, in the Janta reserved forest receiving Kendu leaves, which had been illegally collected from the reserved forest by female labourers. The female labourers on being questioned by the forest guards, who had found them there, stated that they were collecting leaves for the petitioner Tarachand Agarwala.

Mr. P. R. Das, who has argued Criminal Revision No. 258 of 1944 urged that there could not be any conviction of the petitioners under S. 26 (g), Forest Act, having regard to the terms of Notification No. 4246-VIF-13-R, dated 23rd April 1936, published in the Bihar Gazette of 29th April 1936. He drew our attention to the words of S. 26, Forest Act, and pointed out that for an offence to be committed under cl. (g) of sub-s. (1) of S. 26 the act must be done in a reserved forest. Admittedly the forest from which the Kendu leaves were collected belonged to Thakur Lakshmi Narayan Singh Deo of Kera. Section 38, Forest Act, under which the above mentioned notification of the Government was issued, permits the Provincial Government by notification to apply to the land of a private owner the provisions of the Forest Act as it thinks suitable to the circumstances thereof and as may be desired by the applicant. Although the Provincial Government issued the said notification, it did not thereby constitute the forest lands in the schedule thereof a reserved forest. On the contrary, the Provincial Government indicated in para. 2 of the notification that it was pleased merely to declare its intention to constitute the said lands a reserved forest in pursuance of S. 4,

Forest Act. Having declared their intention in this manner it followed that the procedure indicated in the various sections to be found after S. 4 had to be complied with, and it was only when the conditions mentioned in S. 20, Forest Act, had been fulfilled that the forest lands in question could become a reserved forest. It was, however, clear that the Crown had been unable to produce any notification of the Provincial Government published under S. 20 by which they declared the forest lands mentioned in the schedule of the notification of 23rd April 1936, to be reserved forest from a date fixed therein. It was only after such a notification that sub-s. (2) of S. 20 could come into operation. Sub-section (2) states "From the date so fixed such forest shall be deemed to be a reserved forest." Mr. Das, therefore, urged that there could be no conviction of the petitioners for having done any of the acts mentioned in cl. (g) of sub-s. (1) of S. 26, since the forest lands were not a reserved forest. It was further argued on behalf of the petitioners that para. 1 of the notification, dated 23rd April 1936, by which the Provincial Government under the provisions of S. 38, Forest Act, declared that they were pleased to apply to the forest lands all the provisions of the Forest Act which are applicable or may hereafter be extended to apply to the reserved forests belonging to Government in the Singhbhum district, was merely an enabling provision. The argument therefore was that as the forest lands in question had not become a reserved forest, the act of the petitioners was not done in a reserved forest and consequently there was no breach of the provisions of S. 26, Forest Act.

It was further contended by Mr. Das that no one's rights in property could be taken away without compensation. Such rights were preserved by the Government of India Act, 1935. Section 38, Forest Act, was therefore ultra vires as well as the notification of the Provincial Government dated 23rd April 1936 made in pursuance of S. 38 of the said Act.

In the application of Gola Ho it was further argued that his conviction depended largely upon the testimony of accomplices, which at best was corroborated by another piece of tainted evidence. It was also pointed out that as these accomplices, namely, the female labourers had an opportunity of coming into contact with some of the co-accused of Gola Ho, who made statements of a confessional nature when examined under S. 342,

Criminal P. C., it could not be said that their evidence was corroborated by any independent evidence. I would quote in its entirety, barring the schedule, the words of the Government notification dated 23rd April 1936, by which they proposed to apply under S. 38, Forest Act, some of the provisions of that Act to the lands mentioned in the schedule:

"It is hereby declared that in accordance with an application under S. 38, Forest Act, 1927 (16 [XVI] of 1927), made to the Deputy Commissioner of Singhbhum by Thakur Lakshmi Narayan Singh Deo of Kera, Kera Estate, police-station Chakradharpur, District Singhbhum, the Government of Bihar are pleased to apply to the forest lands described in the schedule below all the provisions of the said Forest Act which are applicable or may hereafter be extended to apply to the reserved forests belonging to Government in the Singhbhum District.

2. Government are further pleased in pursuance of S. 4 of the said Act, to declare their intention of constituting the said lands a reserved forest.

3. The Government are further pleased in exercise of the power conferred by the said S. 4 to appoint Babu Shiva Prasad Singh, Deputy Magistrate and Deputy Collector, to be Forest Settlement Officer to inquire into and determine the existence, nature and extent of any right alleged to exist in favour of any person in or over any of the said lands or in or over any forest produce to be found therein and deal with the same as provided by Chap. II of the said Act.

4. The Government are further pleased in exercise of the power conferred by S. 17 of the said Act, to appoint the Deputy Commissioner of Singhbhum to hear appeals referred to in that section."

Before I deal with this notification, I would deal generally with what I consider to be the scheme of the Forest Act. There can be no doubt that forests and afforestation are subjects of prime importance to the administration of a country, and in the need of public interest the Forest Act was enacted to preserve and safeguard forests generally in India. The Act makes various provisions for such conservation of forests, and in the scheme it provides for a Provincial Government to constitute any forest lands or waste lands, which are the property of Government or over which the Government have proprietary rights, a reserved forest. Chapter 2 of the Act, therefore, deals with the subject of reserved forests. Chapter 3 deals with village forests, Chap. 4 deals with protected forests, and Chap. 5 deals with forests and lands not being the property of Government. In this manner it seems to me the Act contemplated the protection of forest lands, under certain conditions, whether they be reserved forests, village forests, protected forests or forests of private owners. In order to make a forest a reserved forest a pres-

cribed procedure enjoined by the various sections found in Chap. 2 has to be complied with, and there can be no doubt that once those provisions have been complied with, then under S. 20 it is provided that

"(1) When the following events have occurred, namely:

(a) the period fixed under S. 6 for preferring claims has elapsed, and all claims, if any, made under that section or S. 9 have been disposed of by the Forest Settlement Officer;

(b) if any such claims have been made, the period limited by S. 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement Officer, has under S. 11, elected to acquire under the Land Acquisition Act, 1894, have become vested in the Government under S. 16 of that Act, the Provincial Government shall publish a notification in the Official Gazette, specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest."

Section 21 then provides that

"The forest officer shall, before the date fixed by such notification, cause a translation thereof into the local vernacular to be published in every town and village in the neighbourhood of the forest."

Now it seems to me that until the conditions mentioned in S. 20, Forest Act, have been fulfilled, a forest cannot be deemed to be a reserved forest. The Act does not define what is a "reserved forest," but I think that the words of sub-s. (2) of S. 20 make it perfectly clear that it is only from the date fixed by the notification mentioned in sub-s. (1) of that section that a forest shall be deemed to be a reserved forest. By the notification, dated 23rd April 1936, made under S. 38 of the Act the Provincial Government applied to the forest-lands mentioned in the schedule to that notification all the provisions of the Forest Act, which are applicable or may hereafter be extended to apply to the reserved forests belonging to Government in the Singhbhum District. It is to be noticed that the notification does not purport to apply all the provisions of the Forest Act. It has applied only those provisions of the Act which are applicable to the reserved forests of the Government in the District of Singhbhum, that is to say, such forests of Government in the District of Singhbhum as have become reserved forests. From the moment a forest has become a reserved forest, ss. 3 to 21 of Chap. 2 of the Act can have no application to it. Hence the provisions of the Act which are applica-

ble to reserved forests of Government in the District of Singhbhum are ss. 22 onwards of Chap. II and other sections of the Act applicable to such forests.

The provisions of Chap. III regarding village forests may also be referred to in this connexion. Section 28 sub-cl. (1) permits a Provincial Government to assign to any village community rights of Government to or over any land which has been constituted a reserved forest. Sub-cl. (2) of this section permits a Provincial Government to make rules for regulating the management of the village forests; and sub-cl. (3) provides that all the provisions of the Forest Act relating to reserved forests shall, so far as they are not inconsistent with the rules so made, apply to village forests. Obviously cl. (3) of S. 28 did not intend that the procedure indicated in ss. 4-21 of the Act should be gone through all over again. What was intended by this clause was that all the provisions of the Act relating to forests which have become reserved forests shall apply to village forests in so far as they are not inconsistent with the rules made under clause (2) and thereby gave protection to the village forests in the same manner as that given to reserved forests. It is to be noticed that neither S. 28 nor S. 38 of the Act provides in express terms for any penalties and it is only by applying the provisions of the Act applicable to reserved forests that any protection can be given to village forests or forests belonging to private owners. There can be no doubt that S. 26 of the Act is applicable to reserved forests.

I do not think that para. 2 of the notification in any way affects the provisions of para. 1 of the notification. It is necessary to refer to S. 38 of the Act in this connexion. Section 38 provides:

"(1) The owner of any land, if there be more than one owner thereof, the owners of shares therein amounting in the aggregate to at least two-thirds thereof may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector their desire—

(a) that such land be managed on their behalf by the forest-officer as a reserved or a protected forest on such terms as may be mutually agreed upon; or

(b) that all or any of the provisions of this Act be applied to such land.

(2) In either case, the Provincial Government may, by notification in the Official Gazette apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants."

It is clear then that an owner may repre-

sent in writing to the Collector his desire that such land be managed on his behalf by the forest-officer as a reserved or a protected forest, or that all or any of the provisions of the Act be applied to such land. Sub-s. (1) of S. 38 is merely a provision which enables an owner of any land to apply to the Collector in order that the provisions of the Act may be applied to his land, or that the land may be managed for him as a reserved forest. By sub-s. (2), however, the Provincial Government in either case may by notification apply to such land such provisions of the Act as it thinks suitable to the circumstances thereof and as may be desired by the applicant. We have not before us the actual representation made by Thakur Lakshmi Narayan Singh Deo of Kera under this section, but it seems to me that on a fair reading of the notification it is clear that the Provincial Government not only purported to apply at once certain provisions of the Act to the lands mentioned in the schedule but also declared their intention to constitute such lands a reserved forest presumably as requested by the Thakur. In my opinion, the wording of sub-s. (2) of S. 38 of the Act is wide enough to contemplate the action of the Provincial Government as indicated by their notification of 23rd April. The immediate effect of para. 1 of the notification was to apply to the lands mentioned in the schedule all the provisions of the Act which were applicable to the reserved forests of Government in the district of Singhbhum. In affording such protection the Provincial Government must have contemplated that claims of certain persons in these lands may thereby be affected, and it was thought desirable that the lands in question should be constituted a reserved forest in order that the various provisions of the Act may come into play in order to enable persons to lay their claims. For this reason I think para. 2 stated that the Government were further pleased in pursuance of S. 4 of the Act to declare their intention of constituting the said lands a reserved forest. The notification went on by paras. 3 and 4 to appoint certain persons to perform certain duties under the Act, such as to appoint the Deputy Commissioner of Singhbhum as the officer to hear appeals under S. 17 of the Act. I can find no real conflict between the words of para. 1 and paras. 2, 3 and 4 of the notification. I am, therefore, satisfied that the provisions of S. 26 of the Act, were applicable to the forest lands of Thakur Lakshmi Narayan Singh Deo of Kara.

As to the contention that S. 38, Forest Act, and the notification made thereunder dated 23rd April 1936 is *ultra vires*, it may be pointed out that S. 38 of the Act does not deprive any owner of any right in property. The section merely enables an owner to apply to the Collector for the management of his forest lands or to have applied to such lands all the provisions of the Act. The application of the owner under S. 38 of the Act is voluntary and a request for the management of his property or for the application of the provisions of the Act to his lands can hardly be said to be deprivation of his rights in such property. His rights in property remain and it is only the management of the property which is requested by him to be done by a forest-officer. Section 38 also enables the owner to represent to the Collector his desire that all or any of the provisions of the Act be applied to such land. Here again the owner by such representation in effect seeks protection and the benefits afforded by the Act. His right in the property still remains. Under S. 292, Government of India Act, 1935, all the law in force in India immediately before the commencement of Part III, Government of India Act, 1935, shall continue in force until altered or repealed or amended by a competent Legislature. Under S. 293, Government of India Act, 1935, it is permissible by Order in Council to make adoptions and modifications in the existing law as it appeared to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Government of India Act, 1935. The Forest Act was enacted in 1927 and by an Order in Council certain modifications were made therein, for instance, the words 'Provincial Government' were substituted for the words 'Local Government.' None of the petitioners have proved that they had any right in the forests and in Criminal Revision No. 256, Tarachand Agarwala asserted that the forest department had given him a lease of Kendu leaves recovered from the forest. There was no proof of this. Even on this assertion whatever rights he claimed, he claimed as a lessee of the forest department and not as a lessee of Thakur Lakshmi Narayan Singh Deo. In Criminal Revision No. 258 no attempt was made to prove that any of the petitioners had any rights in the forests which were affected by the action of the Provincial Government in issuing the notification dated 23rd April 1936 under S. 38 of the Act. I do not, therefore, think that there is any force in the argument

that S. 38, Forest Act, is *ultra vires* of the Government of India Act, 1935.

In the application of Gola Ho although the two female labourers may be called accomplices in the strictest sense, the circumstances are that they were female labourers carrying out the behests of Gola Ho and his master Tarachand Agarwala. The Courts below believed their evidence, and I think there is substantial corroboration in the circumstance that Gola Ho and his companions were found within the forest area purchasing the leaves so collected. I do not think there would be any justification for interference with the conviction on that ground. I think, however, that his sentence is somewhat severe, and I would reduce it to a fine of Rs. 50 only, in default one month's rigorous imprisonment.

In the case of Tarachand Agarwala and others in Criminal Revision No. 258, I would uphold the conviction and sentence of Tarachand Agarwala without any modification, but I would reduce the sentence of the other petitioners who appear to be merely his servants, to a fine of Rs. 50 each, in default one month's rigorous imprisonment. The applications are dismissed with the above modifications.

Meredith J. — I agree.

R.K. *Applications dismissed.*

[Case No. 17.]

A. I. R. (33) 1946 Patna 55

DAS J.

*Lal Mohan Mahanty and another —
Plaintiffs — Appellants*

v.

*Onkar Mall Marwari and another —
Defendants — Respondents.*

Second Appeal No. 160 of 1941, Decided on 6th August 1945 (Cuttack Circuit), from decision of Dist. Judge, Cuttack, D/- 9th September 1941.

(a) Registration Act (1908), S. 49—Collateral purpose—Unregistered compromise petition is admissible to prove nature of possession given under it.

An unregistered compromise petition giving possession to a Hindu widow in lieu of maintenance may be considered for the collateral purpose of explaining the nature of the possession of the widow: ('19) 6 A. I. R. 1919 P. C. 44 and ('24) 11 A. I. R. 1924 Pat. 641, *Rel. on.* [P 57 C 2]

Registration Act —

('45) Chitale, S. 49, N. 14.

('39) Mulla, P. 186, Note "As Evidence of character of possession."

(b) Deed—Construction — Compromise petition giving possession to widow in lieu of her maintenance with condition against alienation — Widow's possession held not adverse —

Instrument did not involve 'transfer', but created interest under S. 6, T. P. Act — S. 10, T. P. Act, did not apply — T. P. Act (1882), Ss. 6 and 10 — Limitation Act (1908), Arts. 142 and 144.

A compromise petition in mutation proceedings stated that the widow, who was the objector, would become the rightful owner in possession of part of land. It further recited, however, that the widow would hold and enjoy the said property during her life-time for her maintenance and that of her daughter, and that she would not be competent to transfer the property. It was stated that the property would be recorded in the name of the person who had applied for mutation :

Held (1) that whether it be a family arrangement or a transfer, the possession which it gave to the widow was not adverse possession to the true owner. [P 58 C 1]

(2) that the compromise petition did not involve any transfer at all. The interest created was one restricted in its enjoyment to the owner personally within the meaning of S. 6, T. P. Act, which interest would not be transferable: ('14) 1 A. I. R. 1914 P. C. 44; ('39) 26 A. I. R. 1939 P. C. 157, *Ref.* [P 58 C 1, 2]

(3) that as the compromise did not involve any transfer or create any life interest for the widow, the condition against alienation was not hit under S. 10, T. P. Act. [P 58 C 1]

Limitation Act —

('42) Chitaley, Arts. 142 and 144 N. 22.

T. P. Act —

('45) Chitaley, S. 10, N. 3.

(c) Registration Act (1908), S. 17 (1) (b) — Compromise petition incorporating family arrangement — Petition informing Court the terms of settlement—Petition does not require registration.

A family arrangement not involving a transfer may be a settlement in which each party takes a share of, or interest in, family property by virtue of an independent title which is to that extent admitted, by the other parties. Such an arrangement may, however, involve a declaration of right under S. 17 (1) (b), Registration Act. Whether the family arrangement involves a declaration of right or not will depend on the facts of each particular case. If it involves a declaration of right, it will require registration. [P 58 C 2]

Where in mutation proceedings a bona fide dispute between the parties is composed, each party recognising an antecedent title in the other, and the parties make a petition to the Court informing the terms of the agreement, there is no necessity to have such a petition registered as it does not purport to create, assign, etc., any right in immovable property within the meaning of S. 17 (1) (b), Registration Act; it is merely a recital of fact by which the Court is informed that the parties have come to an arrangement: ('26) 13 A.I.R. 1926 All. 173, *Rel. on*; ('28) 15 A. I. R. 1928 All. 641 (F.B.) and ('37) 24 A.I.R. 1937 All. 578 (F.B.), *Ref.* [P 59 C 1]

Registration Act —

('45) Chitaley, S. 17, N. 83; N. 62, Pt. 8.

('39) Mulla, S. 17, Page 100, Note "Petition of compromise in mutation proceedings."

B. K. Ray and U. N. Mahanty—for Appellants.
M. S. Rao — for Respondents.

Judgment.—This is a second appeal by the plaintiffs from a judgment of reversal passed by the learned District Judge of Cuttack. The facts out of which the appeal has

arisen are shortly stated below. Plaintiffs 1 and 2 are the appellants before me. They belong to the same family, plaintiff 1 being the nephew of plaintiff 2. One Raghunath was the grandfather of plaintiff 1. Defendant 2 Mani Dei, is the widow of Raghunath being his second wife. Touzi No. 616 and other touzis of mahal Mrutanga, etc., belonged to the plaintiffs and some other co-sharers. Plaintiff 1 lost his father when he was a minor. On death of the father of plaintiff 1, Raghunath, the grandfather of plaintiff 1, was in possession. On the death of Raghunath, his interest in the said touzis devolved on plaintiff 1, who applied for mutation of his name in the revenue records. On this application a mutation case, No. 901/902 of 1926-27, was started. Defendant 2, Mani Dei, objected to the mutation of the plaintiff's name. There was, however, a compromise, the terms of which are mentioned in a document which is Ex. 3 in the record. By the compromise it was settled that Mani Dei would get about 10 acres of *nijchas* lands, appertaining to touzi Nos. 616 and 619, for the maintenance of herself and her daughter till her lifetime. The compromise petition then stated as follows :

"The objector (Mani Dei) will hold and enjoy the said properties during her lifetime, but the objector will not be competent to transfer the immovable property which is given to her."

It was further agreed that the name of plaintiff 1 would be recorded in the revenue records in respect of the property. Plaintiff 1 further agreed to bear the expenses of the marriage of the daughter of Mani Dei. Subsequent to the above compromise, there was a partition amongst the plaintiffs and their cosharers of the mahal. About 5 acres out of the land given to Mani Dei for maintenance were allotted to the share of the plaintiffs, the rest having gone to the share of other cosharers. These 5 acres and odd have been described in schedule 'ga' of the plaint. There was again a partition as between plaintiff 1 and plaintiff 2 in respect of these 5 acres and odd, 3.08 acres described in schedule 'gha' of the plaint falling to the share of plaintiff 1 and 1.96 acres falling to the share of plaintiff 2. I had forgotten to mention before that the compromise petition was dated 12th March 1927. In 1936 Mani Dei executed a simple mortgage in favour of defendant 1, Onkar Mall Marwari, for a sum of Rs. 100 only, in respect of the said 5 acres and odd land. On the foot of this mortgage Onkar Mall Marwari obtained a decree against Mani Dei, and in execution

thereof he purchased the said lands on 20th February 1940. The case of the plaintiffs was that the widow had only a personal right of enjoyment of the usufruct of the lands and that she had no power of alienation. The plaintiffs, therefore, asked for a declaration that Mani Dei had no right to transfer the land and that the sale of the land in execution of the mortgage decree be set aside. They further prayed for a permanent injunction against defendant 1, restraining him from taking possession of the disputed land.

The defence was that Mani Dei had the power of alienation; plaintiff 1 had agreed to meet the expenses of her daughter's marriage, but the plaintiffs had not met the expenses of the marriage, and, therefore, Mani Dei had to raise money by mortgaging the lands. The defence contended that Mani Dei could mortgage the lands for justifying legal necessity.

The trial Court gave a decree in favour of the plaintiffs, holding that Mani Dei had the right to enjoy only the usufruct of the lands for her maintenance till her death and that she had no power of alienation in respect of the property. The trial Court repelled the contention that the restriction on alienation was invalid in law, and the further contentions that the compromise created a widow's estate in favour of Mani Dei or an absolute gift in her favour. The Court of appeal below rightly pointed out that there was no question of a widow's estate, inasmuch as Mani Dei did not inherit the property as a widow. The Court of appeal below found that the compromise involved a transfer of property from one person to another, and the compromise petition required registration; in the absence of registration the document was not admissible in evidence and no other evidence could be given as to the terms contained therein. Inasmuch as there was an admission in para. 4 of the plaint that the widow was in possession since March 1927, and the suit was brought in 1940, that is, more than 12 years after, the learned District Judge came to the finding that the widow had perfected her title by adverse possession and that title would pass to her successor in interest, namely, defendant 1. It is on this finding of adverse possession that the learned District Judge has disposed of the appeal.

On behalf of the appellants it has been contended before me that the finding of the learned District Judge regarding title by adverse possession is incorrect. In my opin-

ion, this contention is correct. The learned District Judge has proceeded on the footing that the compromise of 1927 effects a transfer of property from one person to another. He has not, however, come to any finding as to the nature of the transfer, nor has he considered the question if the compromise can be treated as a family arrangement which involves no transfer. Even if the compromise petition be considered as a transfer of property from one person to another, it was necessary for the learned District Judge to come to a finding on the nature of the transfer. If the transfer was of the nature of a gift, which was not effected by a registered deed, then the question of perfecting title by 12 years' possession would arise. As has been held in *A. I. R. 1919 P. C. 44*¹ where the donor did not effect a registered gift-deed but allowed the donee to enter into possession of the gifted property, and the donee thus remained in possession for over twelve years, the title of the donee became perfected as against the donor's heirs. In the same case, it has been held that even if the document were not admissible to prove a gift, it may nevertheless be referred to as explaining the nature and character of the possession held by the donee. In *5 P.L.T. 541*² it has been held that a document which is inadmissible in evidence for the purposes mentioned in S. 49, Registration Act, may nevertheless be admitted for a collateral purpose, as for example, to explain why a transferee, under a deed imperfect through lack of registration, was in possession, or to prove the nature of that possession. Therefore, the compromise petition (Ex. 3) even though it be accepted as an imperfect title deed for lack of registration may be considered for the collateral purpose of explaining the nature of the possession of the widow. If so considered, it is clear to me that the possession of the widow was in no sense adverse possession. The widow was allowed to possess the land during her lifetime for her maintenance, with no right of alienation. If the compromise creates only a life interest, or if it operates not as a transfer but as an admission that the widow has no right to alienate, and creates in her favour a restricted interest, which under S. 6, T. P. Act, is not transferable then it can hardly be said that the widow has got an

1. (19) 6 A. I. R. 1919 P. C. 44: 43 Mad. 244: 46 I. A. 285: 53 I. C. 901 (P. C.), *N. Varada Pillai v. Jeevarathnammal*.

2. (24) 11 A.I.R. 1924 Pat. 641: 3 Pat. 349: 79 I.C. 26: 5 P.L.T. 541, *Janki Kuer v. Brij Bhikan, Ojha*.

absolute title by twelve years' possession. In coming to his finding on the question of adverse possession the learned District Judge has not considered the document from these aspects. He has merely stated that the compromise involves a transfer of property without indicating the nature of the transfer, and has then come to the finding that the widow has perfected her title by adverse possession inasmuch as the compromise is not registered. I am of the view that the finding of the learned District Judge on the question of adverse possession cannot be supported. Adverse possession was not pleaded by the defendants; and even if the document (Ex. 3) is considered for the collateral purpose of showing the nature of the possession of the widow, then it is clear to me that, whether it be a family arrangement or a transfer, the possession which it gives is not adverse possession.

I am, however, prepared to go further, and hold that on a proper construction of the compromise petition (Ex. 3) it is nothing but a family arrangement which does not involve any transfer. On behalf of the respondent, it has been contended before me that S. 10, T. P. Act, hits the condition restraining alienation contained in the compromise petition, and reliance has been placed on the case in 143 I.C. 65.³ Section 10, T.P. Act, would only apply if the compromise involves a transfer or creates a life interest for the widow, coupled with a repugnant condition which prohibits alienation absolutely. In the view which I take of the compromise petition, it does not involve any transfer at all. It is merely an admission of an interest of the widow in the property, the interest so admitted being a restricted interest, such as that of enjoyment of the usufruct only, which would not be alienable under S. 6, T. P. Act. The compromise petition is to be read as a whole for its proper interpretation. It no doubt states that the widow, who was the objector in the mutation case, would become the rightful owner in possession of 10 acres of land. It further recites, however, that the widow will hold and enjoy the said property during her lifetime for her maintenance and that of her daughter, and that she will not be competent to transfer the property. Read as a whole, the compromise petition does not involve any transfer of property, nor does it create any life interest in favour of the widow, coupled with a repugnant condition prohibiting alienation absolutely. It

3. ('32) 19 A.I.R. 1932 All. 662 : 54 All. 366 : 143 I.C. 65, *Dhup Nath v. Ram Charitra*.

merely operates as an admission that the widow has the restricted right of enjoying the usufruct of 10 acres of land during her lifetime and that she has no power of alienation. It is significant that in the compromise petition it is stated that the property will be recorded in the name of the plaintiff in the revenue record, though 10 acres are being given to the widow for the enjoyment of the usufruct thereof for the purpose of maintenance. In this view of the matter S. 10, T. P. Act, will not apply, and the interest of the widow under the compromise petition is an interest restricted in its enjoyment to the owner personally within the meaning of S. 6, T. P. Act, which interest will not be transferable: see in this connexion the cases in 18 C. W. N. 929⁴ and A. I. R. 1939 P. C. 157.⁵

There is a further question which requires consideration. The question is if the compromise petition requires registration even as a family arrangement, I must say that this question is not entirely free from difficulty. A family arrangement not involving a transfer may be a settlement in which each party takes a share of, or interest in, family property by virtue of an independent title which is to that extent admitted by the other parties. Such an arrangement may, however, involve a declaration of right under S. 17 (1) (b), Registration Act. Whether the family arrangement involves a declaration of right or not will depend on the facts of each particular case. If it involves a declaration of right, it will require registration. In a Full Bench decision of the Allahabad High Court in 51 ALL. 79⁶ it has been laid down that a binding family arrangement, in which there is no exchange or other transfer of ownership, can be made orally : if such arrangement is followed by a writing containing a reference to it, then the question is whether thereby the terms of the arrangement have been "formally recorded in a document" with the purpose that they should be evidenced by that document, and that is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which, and the purpose with which, it was written. If the reference to the family arrangement was

4. ('14) 1 A. I. R. 1914 P. C. 44 : 24 I. C. 309 : 18 C.W.N. 929(P.C.), *Mt. Hiran Bibi v. Mt. Sohan Bibi*.

5. ('39) 26 A. I. R. 1939 P.C. 157 : I. L. R. (1939) Kar. P.C. 274 : 181 I. C. 359 (P.C.), *Lachmeshwar Sahai v. Mt. Moti Rani Kunwar*.

6. ('26) 15 A.I.R. 1928 All. 641 : 51 All. 79 : 116 I. C. 861 (F.B.), *Ram Gopal v. Tulshi Ram*.

merely for the purpose of informing the Court of the arrangement which is arrived at, the document would not require registration, and it can be used as a piece of evidence or as an admission of the family arrangement. If on the contrary the document is intended to be a formal record of the arrangement, in other words if it is intended as a document of title, it will require registration. The principles laid down in the aforesaid Full Bench decision were followed in the subsequent case in I. L. R. 1937 ALL. 817.⁷ I have already stated that the question whether the compromise petition requires registration or not even as a family arrangement is not entirely free from difficulty. There is a recital in the compromise petition that the dispute between the parties has been settled by respectable persons, which settlement has been accepted by both parties. The facts of the present case appear to me to be more or less similar to the case in A.I.R. 1926 ALL. 173⁸ in which it has been held that where a bona fide dispute between the parties is composed, each party recognising an antecedent title in the other, and the parties make a petition to the Court informing the terms of the agreement, there is no necessity to have such a petition registered as it does not purport to create, assign, etc., any right in immovable property within the meaning of S. 17 (1) (b), Registration Act; it is merely a recital of fact by which the Court is informed that the parties have come to an arrangement. I am, therefore, inclined to hold that the compromise petition in this case did not require registration, it merely amounted to an admission of the rights of the parties by virtue of a prior settlement, and informed the Court of the terms of the settlement.

The family arrangement arrived at between the parties was a valid arrangement legally binding on the parties. The widow was given a restricted right of enjoyment of the usufruct, and she had no power of alienation. In this view of the matter, the appellants are entitled to succeed. The result, therefore, is that the appeal is allowed and the decree of the learned District Judge is set aside and that of the Munsif is restored. The appellants are entitled to costs throughout.

K.M./V.B.

Appeal allowed.

7. (37) 24 A.I.R. 1937 All. 578; I.L.R. (1937) All. 817 : 170 I. C. 843 (F. B.). Mahadei Kunwar v. Padarath Chaube.

8. (26) 13 A.I.R. 1926 All. 173 : 48 All. 213 : 90 I. C. 992, Bakhtawar v. Sunder Lal.

[Case No. 18.]

A. I. R. (33) 1946 Patna 59

FAZL ALI C. J. AND SINHA J.

Sarabdeva Prasad — Appellant

v.

Dwarka Prasad — Respondent.

Second Appeal No. 842 of 1943, Decided on 14th February 1945, from decision of Sub-Judge, Muzaffarpur, D/- 5th May 1943.

(a) Limitation Act (1908), S. 20 — Payment without indication whether it is towards interest or principal — Appropriation by creditor towards principal, to save limitation, must be before expiry of limitation.

In order to obtain a fresh period of limitation under S. 20, any appropriation by the creditor towards the principal of any sum paid by the debtor without indicating whether the payment is towards interest or principal, must be before the expiration of the period of limitation : ('40) 27 A. I. R. 1940 P. C. 63, *Foll.* [P 60 C 1]

Limitation Act —

('42) Chitale, S. 20, N. 5, Pt. 24.

('38) Rustomji, S. 20, Page 413, Pt. 8.

(b) Limitation Act (1908, as amended by Act 16 [XVI] of 1942), S. 20 — Amendment is not retrospective.

The amendment to S. 20 cannot have retrospective operation in the sense that it can apply to a suit which had been instituted prior to this amendment : ('45) 32 A. I. R. 1945 Pat. 368, *Rel. on.* [P 60 C 2]

*Kailash Ray — for Appellant.**K. Dayal — for Respondent.*

Sinha J. — This is a defendant's second appeal from the decision of the learned Subordinate Judge of Muzaffarpur reversing that of the Munsif of Bettiah in a suit for money based on a chitta dated 25th December 1936 evidencing an advance of Rs. 520 by the plaintiff to the defendants. The suit was instituted on 21st November 1941 when on the face of it the claim would be barred by limitation, but it was alleged in para. 7 of the plaint that defendant 1 on behalf of his joint family and as karta thereof paid the sum of Rs. 10 on account of principal and interest, but in the account appended to the plaint the plaintiff has proceeded on the footing that Rs. 10 was appropriated towards the principal sum due.

The defendant appellant contested the suit chiefly on the ground of limitation denying the alleged payment of Rs. 10 either towards the interest or towards principal. The trial Court dismissed the suit holding that the alleged payment had not been proved. On appeal by the plaintiff the lower appellate Court reversed the decision of the trial Court and came to the conclusion that the endorsement appearing on the chitta to the effect that Rs. 10 had been paid

had really been made by the defendant and that the thumb impression affixed to the endorsement was also his. On that finding the lower appellate Court came to the conclusion that under S. 20, Limitation Act, the suit was saved from the bar of limitation. It also observed that even if it be held that the provisions of S. 20, Limitation Act, were not attracted to this endorsement, the same would amount to an acknowledgment of an existing liability and therefore S. 19 of the Act would apply. In that view of the matter the suit was decreed. Hence this second appeal by the defendant.

Mr. B. N. Ray appearing on behalf of the appellant has contended that this case is governed by the decision of their Lordships of the Judicial Committee in 21 Lah. 470.¹ In that case their Lordships laid it down that where a debtor pays a sum of money in part payment of an interest-bearing debt without indicating whether the payment is towards interest or principal, in order to obtain a fresh period of limitation under S. 20, Limitation Act, it is incumbent on the creditor to appropriate the sum paid towards the principal *before* the expiration of the prescribed period of limitation. In the present case the findings of fact arrived at by the lower appellate Court did not amount to holding that the appropriation made by the plaintiff was so made before the expiry of the period of limitation for a suit on the chitta itself. The finding of the lower appellate Court as regards the appropriation is based on the statement in para. 7 of the plaint read along with the account appended to it. That would amount to saying that by the method of appropriation as evidenced by the plaint, the plaintiff made the appropriation of Rs. 10 towards the principal sum. There is no finding arrived at by the lower appellate Court to bring the case within the purview of the decision of their Lordships of the Judicial Committee referred to above. Mr. B. N. Rai also contended that there is no evidence on the record that such an appropriation was made at any time within the period of limitation for a suit on the original chitta itself. Mr. Kameshwar Dayal appearing on behalf of the respondent was not in a position to controvert that statement, but he contended that as the finding of the lower appellate Court is that the appropriation had been

made by the plaintiff towards the principal sum, the presumption is that it must have been done at the time the payment was made. But the difficulty in the way of the respondent is that he has not produced his account books or any other evidence in support of the contention raised on his behalf. It must, therefore, be held that there is no evidence to support the contention that the appropriation was made within the period of limitation. That being so, the claim was made beyond three years from the accrual of the cause of action and therefore out of time. But Mr. Kameshwar Dayal further contended that the provisions of Act 16 [XVI] of 1942 would have the effect of saving limitation even in respect of a cause of action which had arisen, and even in respect of a suit which had been filed, before the coming into effect of the said legislation. This Act was enforced on 30th March 1942 long after the institution of the suit. As held by a Division Bench of this Court in the unreported case of *Baleshwar Prasad v. Latafat Karim* (Civil Revn. No. 532 of 1943² decided by Manohar Lall and Beevor JJ. on 26th October 1944) this Act cannot have retrospective operation in the sense that it can apply to a suit which had already been instituted. We are bound by that decision which is specifically on the very same question raised by Mr. Dayal in this case. In that view of the matter, it must be held that the suit is barred by limitation and that the decision of the learned Munsif was correct and that of the learned Subordinate Judge erroneous. The appeal is accordingly allowed, but in the circumstances each party will bear its own costs throughout.

Fazl Ali C. J. — I agree.

V.B.

Appeal allowed.

2. *Since reported in* ('45) 32 A. I. R. 1945 Pat. 368 : 24 Pat. 249.

[Case No. 19.]

A. I. R. (33) 1946 Patna 60

MANOHAR LALL AND DAS JJ.

Jagdish Prasad Singh — Appellant
v.

Saligram Lal and others—Respondents.

Second Appeal No. 1416 of 1943, Decided on 27th March 1945, from decree of Addl. Dist. Judge, Bhagalpur, D/- 20th August 1943.

Limitation Act (1908, as amended by Act 16 [XVI] of 1942), S. 20 - S. 20 as amended applies only to suits instituted after it came into force.

The law of limitation applicable to a suit is the law applicable which prevails at the date when the

1. ('40) 27 A. I. R. 1940 P. C. 63 : I. L. R. (1940) 21 Lah. 470 : I. L. R. (1940) Kar. P. C. 134 : 67 I. A. 160 : 187 I. C. 233 (P. C.), Rama Shah v. Lal Chand.⁵

suit is instituted. Section 20 as amended, therefore, applies only to suits instituted after it came into force : ('45) 32 A.I.R. 1945 Pat. 368 and ('46) 33 A. I. R. 1946 Pat. 59, *Rel. on ; Case law discussed.* [P 62 C 1]

Limitation Act —

('42) Chitaley, Preamble N. 15 Pt. 10.

('38) Rustomji, Page 15, Pts. 4, 5, 7.

N. K. Prasad (No. 1) and K. K. Sinha —
for Appellant.

*K. N. Lal and J. M. Ghosh—*for Respondents.

Manohar Lall J.—In this appeal by the defendant the only question for decision is whether the suit of the respondents to recover their dues on a handnote was barred by limitation.

On 16th June 1934, the appellant executed a handnote in favour of the plaintiff for a sum of Rs. 3340-12-0 to carry interest at Re. 1 per cent. per mensem. On 16th July 1934 a sum of Rs. 100 was paid by the defendant towards the dues on the handnote, and, on 9th August 1934, another sum of Rs. 125 was paid by the defendant. As these two sums were more than the interest due on those dates the Courts below have found that by these two payments a part of the principal and a part of the interest due was paid off. Three open payments were made on 16th June 1935 (Rs. 110) on 28th November 1937 (Rs. 67-8-0) and on 8th April 1939 (Rs. 20). The plaintiff's case was that these three amounts were paid towards interest as such, but the Courts below have concurrently held that the last three payments were clearly open payments. It should be stated here that all these payments were duly endorsed on the back of the handnote by defendant 1 under his signature but he did not state that he was paying these amounts towards interest as such. In evidence P. W. 2 Saligram Lal, the plaintiff, stated :

"It is customary to charge payments towards interest and so these payments have been credited towards interest, though they have not been shown paid as such in my bahis. Neither defendant 1 said at the time of payments nor did I, whether the payments were being made towards principal or interest."

In these circumstances the only conclusion possible is that which has been drawn by the learned Judge that these last three payments were clearly open payments, and the argument of Mr. K. N. Lal to the contrary cannot be accepted. The plaintiff further stated that as he was entitled to appropriate the last three payments towards interest he has done so. The learned Munsif, however, came to the conclusion that there was no evidence that the plaintiff has appropriated these sums towards principal within three years of the date of the payments or at any

rate before the date of the suit and that the only document showing appropriation is the plaint itself and that Exs. 3 and 3 (a), entries in the plaintiff's books do not show the alleged appropriation.

The learned Judge in appeal, however, thought that the plaintiffs were entitled to appropriate the last three payments towards interest if they liked and they have done so as stated by P. W. 2 though it is not specifically mentioned in the books of account. The learned Judge also relied upon Act 16 [XVI] of 1942 by which S. 20, Limitation Act, has been amended and held that the last three payments which were endorsed by defendant 1 saved limitation. Accordingly he reversed the decision of the learned Munsif and decreed the suit of the plaintiff. Hence the second appeal to this Court. Mr. N. K. Prasad No. 1 who appears on behalf of the appellant, argued that the suit of the plaintiff was barred by limitation under the law which stood before the Amending Act of 1942. In this contention he is supported by the decision of their Lordships of the Judicial Committee in the well-known case in 67 I. A. 160¹ and also by the recent decision of this Court in 24 Pat. 96.²

Mr. N. K. Prasad No. 1 submits that the new Amending Act can have no application to this case and relies upon a number of decisions of the other High Courts particularly on (1944) 1 M. L. J. 347,³ 68 M. L. J. 63⁴ A.I.R. 1944 Bom. 37,⁵ A.I.R. 1944 Lah. 88,⁶ and draws attention to the principle laid down by their Lordships of the Judicial Committee in 48 I. A. 335⁷ at p. 344. But unfortunately for him the matter has been decided expressly by a Division Bench of this Court, of which I was a member, in Civil Revn. No. 532 of 1943⁸ in which we

1. ('40) 27 A.I.R. 1940 P. C. 63 : I.L.R. (1940) Lah. 470 : I.L.R. (1940) Kar. P. C. 134 : 67 I.A. 160 : 187 I. C. 233 (P.C.), *Rama Shah v. Lall Chand.*

2. ('45) 32 A.I.R. 1945 Pat. 271 : 24 Pat. 96 : 220 I. C. 255, *Firm Ramchandra Kesardeo v. Firm Sheikhshitu Sheikh Rahmat.*

3. ('44) 31 A.I.R. 1944 Mad. 398 : 1944-1 M.L.J. 347, *Audayammal v. Ambashankar.*

4. ('35) 22 A.I.R. 1935 Mad. 245 : 157 I. C. 272 : 68 M. L. J. 63, *Krishna Swami Naicker v. Thiruvengada Mudaliar.*

5. ('44) 31 A.I.R. 1944 Bom. 37 : 215 I. C. 12, *Harkubai Fakirchand v. Shankerbhai Zaverbhai.*

6. ('44) 31 A.I.R. 1944 Lah. 88 : I.L.R. (1944) Lah. 528 : 213 I. C. 253, *Dial Singh v. Mohammad Ali.*

7. ('22) 9 A.I.R. 1922 P. C. 187 : 49 Cal. 203 : 48 I. A. 335 : 74 I. C. 660 (P.C.), *Sachindra Nath v. Maharaj Bahadur Singh.*

8. *Reported in* ('45) 32 A.I.R. 1945 Pat. 368 : 24 Pat. 249, *Damodar Prasad v. Latafat Karim.*

held that the provisions of the Limitation Act applicable to such a suit are the provisions which existed on the date when the suit was instituted, and that the provisions of S. 20, Limitation Act, as amended by Act 16 [XVI] of 1942 must operate to decide the question of limitation. This is exactly the situation in the present case. This decision has been followed by another Division Bench of this Court in an unreported case—second appeal No. 842 of 1943.⁹

For these reasons I must affirm the decision of the learned Additional Judge and dismiss this appeal, but in the circumstances I would make no order for costs. I desire to observe that when we gave our decision in Civil Revision No. 532 of 1943⁸ our attention was not drawn to the authorities cited before us by Mr. N. K. Prasad No. 1 which at the first sight may appear to present some difficulty but I am not prepared to differ from the decision which we gave on that date. That decision has been followed by another Division Bench as stated already.

Das J.—I agree to the order proposed by my learned brother. Had the matter not been settled by a decision of this Court, I would probably have come to the conclusion that the Amending Act (Act 16 [XVI] of 1942) cannot operate so as to revive and make effective a barred right. The reasons for such a conclusion have been explained in 68 M.L.J. 63⁴ and (1944) 1 M.L.J. 347.³ Those decisions are based on the following observations made by their Lordships of the Judicial Committee in 48 I. A. 335⁷ regarding the application of the Limitation Act of 1908:

"There is no provision in this latter Act so retrospective in its effect as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time."

The decision of a Division Bench of this Court in Civil Revn. No. 532 of 1943⁸ has however decided the question for this Court, and the conclusion arrived at therein is supported by the decision of their Lordships of the Judicial Committee in 40 I. A. 74,¹⁰ though it may be urged that the question before their Lordships was not exactly the same, namely, if the subsequent Act of Limitation would operate so as to make effective a barred right. The latter decision in Second Appeal No. 842 of 1943⁹ has followed the earlier decision referred to above by holding that the amending Act cannot have retrospective operation in the sense that it cannot apply

to a suit which had already been instituted. In view of these decisions, the Single Judge decisions of the Madras High Court in 68 M. L. J. 63⁴ and (1944) 1 M. L. J. 347³ cannot be relied on in preference to Division Bench decisions of this Court. I should like to add that in (1944) 1 M. L. J. 347³ and A.I.R. 1944 Bom. 37⁵ on which the appellant relied—the suits were brought before the amending Act came into force, unlike the present case where the suit was brought after the amending Act had come into force. It may therefore be argued that the law of limitation on the dates on which those suits were brought was the old law, and not the amending Act of 1942; and under the old law those suits were correctly decided. The Lucknow decision in 18 Luck. 241¹¹ does not really decide the question, though certain observations are made therein to the effect that the appellant may be entitled to the benefit of a change of law made during the pendency of an appeal. All that was decided in Lucknow case was that the amending Act in question could be taken advantage of by an applicant for revision. The learned Judges were dealing with a revision application, and it was not necessary for them to decide, and that they did not decide whether the new S. 20 would apply to a suit brought long before the amending Act had come into force. As far as this Court is concerned it has been definitely held that the new section would not apply to a suit brought before the amending Act had come into force, and that it would apply only in a suit brought after the amending Act has come into force. In other words, the law of limitation which would apply is the law which prevails on the date when the suit is instituted. I do not think we can go back on the decisions of this Court, though as I have stated above, I would personally have come to a different conclusion if the matter were not covered by the aforesaid decisions of this Court.

G.N. *Appeal dismissed.*

11. ('42) 29 A.I.R. 1942 Oudh 508; 18 Luck. 241; 202 I. C. 750, Durga Prasad v. Kishuni.

[Case No. 20.]

* **A. I. R. (33) 1946 Patna 62**

FAZL ALI C. J. AND SINHA J.

Jhaman Mahton — Appellant

v.

Amrit Mahton and others —

Respondents.

Appeal No. 753 of 1942, Decided on 22nd February 1945, from decision of Sub-Judge, Patna, D/- 22nd June 1942.

9. Since reported in ('46) 33 A.I.R. 1946 Pat. 59, Sarabdeva Prasad v. Dwarika Prasad.

10. ('13) 35 All. 227 : 40 I. A. 74 : 19 I. C. 291, Soni Ram v. Kanhaiya Lal.

* (a) Registration Act (1908); Ss. 77 and 49, proviso — Registrar refusing to register sale-deed — Aggrieved party can bring suit under S. 77 or he may sue for specific performance of contract of sale — Unregistered sale-deed is admissible as evidence of contract of sale in such suit.

Where the Registrar refuses to register a sale-deed it is open to the aggrieved party either to bring a suit for mere registration of the sale-deed under S. 77 or to have recourse to the fuller and more comprehensive remedy provided by a suit for specific performance of the contract of sale. The suit for specific performance of the contract of sale is not barred merely because the aggrieved party does not choose to bring a suit under S. 77 within the prescribed time : ('26) 13 A.I.R. 1926 Pat. 89, *Approved*; ('26) 13 A.I.R. 1926 Mad. 530, *Dissent.*; *Case law discussed.* [P 64 C 2; P 65 C 1]

In the suit for specific performance of the contract of sale the unregistered sale-deed is admissible under the proviso to S. 49 as evidence of the contract of sale : ('26) 13 A. I. R. 1926 Pat. 89, *Explained and approved.* [P 65 C 1]

(b) Registration Act (1908), S. 77—Suit under — Scope of.

Where on the refusal of the Registrar to register a document the aggrieved party brings a suit under S. 77 his claim has to be confined only to the registration of the document, because in a suit under S. 77 the Court is only concerned with the genuineness of the document sought to be registered, that is, whether the document is executed by the person by whom it is alleged to be executed, and not its validity and the question of its validity must be determined in a suit properly framed for that purpose. [P 65 C 1]

A suit in which a decree for possession is sought and relief is asked for against a third person to whom the property has been transferred by the person who executed the deed in plaintiff's favour is outside the scope of S. 77. [P 65 C 1]

Lal Narain Sinha — for Appellant.

C. P. Sinha — for Respondents.

Fazl Ali C. J.—This second appeal has been referred to a Division Bench by a learned Single Judge of this Court in view of the apparent conflict between 7 P. L. T. 730¹ and 49 Mad. 302.² The point of law upon which there is a conflict will appear from the discussion which follows. It appears that on 4th August 1939 one Budhan Mahto (respondent 3) executed a sale-deed in favour of the plaintiffs in respect of 2.11 acres of land which he purported to sell by the document for a sum of Rs. 700. As Budhan Mahto failed to register the deed, the plaintiffs applied for compulsory registration, but Budhan did not appear before the Registrar and the document was not registered. There is nothing before us to show that the Registrar refused to register the document so as

to enable the plaintiffs to have recourse to a suit as provided by S. 77, Registration Act, but the appeal has been argued on the assumption that the plaintiffs could have brought a suit under S. 77 and I shall proceed on that basis. In fact the plaintiffs did not bring a suit under S. 77 but they brought the present suit on 27th February 1940 after Budhan had executed and registered another deed of sale in favour of the appellant in respect of 1.66 acres for a sum of Rs. 500 out of the land which was the subject of the previous sale-deed in favour of the plaintiffs. In this suit the plaintiffs prayed for (1) a decree directing Budhan Mahto specifically to perform his part of the contract including registration of the sale-deed and to do all necessary acts to put the plaintiffs in full possession of the property which was the subject of the sale-deed of 4th August 1939; (2) an order directing the sale-deed to be registered; and (3) a decree for possession of the lands in question.

The suit has been decreed by both the Courts below and the lower appellate Court while decreeing the suit has directed that if Budhan Mahton should fail to execute the document of sale within the time allowed, the Munsif must do so on his behalf. This appeal has now been preferred by defendant 3 in whose favour the sale-deed was executed by Budhan on 14th September 1939. In arguing this appeal Mr. Lal Narain Sinha has chiefly relied upon 49 Mad. 302² in which it has been held that if on denial of execution by the vendor, the Registrar refuses to register a sale-deed presented by the purchaser for registration, the sole remedy of the purchaser is to file a suit as provided by S. 77, Registration Act, for registration of the deed within 30 days of the refusal and a suit for specific performance of the contract, such as the execution of a new sale-deed and delivery of lands does not lie. Coutts-Trotter C. J. who delivered the judgment in that case has based it upon S. 77, Registration Act, which provides :

"Where the Registrar refuses to order the document to be registered, under S. 72 or S. 76, any person claiming under such document, or his representative, assign or agent, may within thirty days after the making of the order of refusal, institute in the civil Court, . . . a suit for a decree directing the document to be registered . . . if it be duly presented for registration within thirty days after the passing of such decree."

One of the questions which appears to have been argued in the above mentioned case was that S. 77 was not the only remedy open to the aggrieved party when a Registrar re-

1. ('26) 13 A. I. R. 1926 Pat. 89 : 95 I. C. 187 : 7 P. L. T. 730, *Uma Jha v. Chetu Mandar*.

2. ('26) 13 A.I.R. 1926 Mad. 530 : 49 Mad. 302 : 100 I.C. 385, *Satyanarayana v. Chinna Venkata-rao*.

refused to register the document, but there was also an alternative remedy open to him in the shape of a suit for specific performance of the contract of sale. Coutts-Trotter C.J. however, negatived this argument and relied upon the judgment of a Bench of the Madras High Court in 16 Mad. 341³ where the learned Judges say this :

"If defendant had appeared and admitted execution, the document would have been registered. If he had appeared and denied execution, registration would have been refused and plaintiff would have been entitled to an enquiry before the Registrar under Ss. 73 to 76. If defendants did not appear, plaintiff might have proved execution of the document, and on such proof would have been entitled to registration. If the registering officer was not satisfied with the evidence of execution and refused to register, an appeal would have lain to the Registrar under S. 72. If the decision under S. 72 or S. 76 had been adverse to plaintiff, he would have a remedy by suit under S. 77 of the Act. Plaintiff had, therefore, a complete remedy under the act, and not having chosen to follow it, has only himself to blame that the efficacy of the document has not been completed by registration."

He then proceeded to add,

"the remedy of specific performance though a statutory remedy was simply a crystallisation into statutory form of an equitable remedy to which laches was as it is to all equitable claims, an answer. How it can be said that a man who is given an express statutory remedy by an Act of Legislature under S. 77 of the Registration Act, and has failed to take advantage of it, has not been guilty of laches and is entirely free from blame, passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the statute cannot come to this Court and ask for an exercise in his favour of a discretionary and equitable remedy."

The view expressed in this decision is opposed to the view which was taken by Allahabad High Court in 7 A. L. J. 887⁴ and Calcutta High Court in 12 C. L. J. 464⁵ and 27 C. L. J. 538,⁶ and by this Court in 7 P. L. T. 730.¹ The facts of the last mentioned case are very similar to those of the present case and it was held by Das and Ross JJ. that independently of the provisions of S. 77, Registration Act, a suit to compel registration of a document would not lie but the Registration Act did not touch or affect the equitable jurisdiction possessed by the civil Court to pass a decree for specific performance where circumstances existed entitling the plaintiff to claim such a decree. It was further held that although a document which was not registered would be inoperative as a

conveyance yet it would be admissible in evidence in a suit to enforce specific performance of a contract which must be deemed to have preceded the execution of the document. It was contended before us that the authority of this decision has been shaken by the decision of the Privy Council in 56 I. A. 363.⁷ In that case it has been held that a document which upon its true construction is a sale-deed purporting to transfer an interest in immovable property of the value of Rs. 100 and upwards, is precluded by S. 49, Registration Act, 1908, from being admitted in evidence in a suit for specific performance of the agreement to transfer said to be contained therein, unless it is registered in accordance with the Act. It is clear that all that was decided in that case was that a contract for sale also required registration and it could not be used as evidence in a suit for specific performance of the contract. Soon after the decision of the Privy Council S. 49, Registration Act, was amended by Legislature and a proviso was added to the following effect :

"Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. 2, Specific Relief Act, 1877, or as evidence of part performance of a contract for the purpose of S. 53A, T. P. Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

Therefore, even if we hold that the view expressed by Das and Ross JJ. to the effect that a document which has not been registered though inoperative as a conveyance is admissible in evidence in a suit to enforce specific performance of the contract was wrong at the time when that view was expressed, yet having regard to the subsequent amendment of S. 49 the legal position is exactly the same as was stated in that case. The two difficulties which were stated to be in the way of the plaintiffs are: (1) that a suit for specific performance cannot lie when the special remedy provided by S. 77, Registration Act, has not been availed of and (2) that the document of 4th August 1939 cannot be admitted in evidence in the present suit because it was not registered. So far as the first proposition is concerned, I have no hesitation in adopting the view which has prevailed in this Court and in the Allahabad and the Calcutta High Courts. In my opinion in a case like the present there are two

3. ('89) 16 Mad. 341, Venkataswami v. Kristayya.

4. ('10) 7 I. C. 408 : 7 A. L. J. 887, Amer Chand v. Nathu.

5. (10) 8 I. C. 794 : 12 C. L. J. 464, Surendra Nath v. Gopal Chunder.

6. ('19) 6 A. I. R. 1919 Cal. 477 : 44 I. C. 361 : 27 C. L. J. 538, Nasiruddin Midda v. Bipra Das.

7. ('29) 16 A. I. R. 1929 P. C. 269 : 51 All. 771 : 56 I. A. 363 : 119 I. C. 633 (P.C.), James R. R. Skinner v. R. H. Skinner.

alternative remedies available to the plaintiff. It is open to him either to bring a suit under S. 77, Registration Act, merely for the registration of the document and if he chooses to adopt that course, that suit must be brought within 30 days of the date when the Registrar refuses to register the document. It is equally open to him to have recourse to the fuller and more comprehensive remedy provided by a suit for specific performance of the contract of sale. If he brings the suit under S. 77, his claim has to be confined only to the registration of the document, because, as has been held in several cases, in a suit under S. 77 the Court is only concerned with the genuineness of the document sought to be registered that is, whether the document is executed by the person by whom it is alleged to be executed, and not its validity and the question of its validity must be determined in a suit properly framed for that purpose. In the present case, however, the plaintiffs were not only concerned with obtaining the registration of the document but also wanted the possession of the land which was subject of the unregistered sale-deed. They further wanted a relief as against a third party who was brought on the scene on account of a subsequent sale-deed having been executed in his favour by Budhan Mahto on 14th September 1939. The scope of the present suit is obviously much wider than that of a suit under S. 77 and I do not find any law which precludes the plaintiffs from bringing a suit which will give them fuller relief than a suit under S. 77 for mere registration of the document. It has been consistently held in this Court and several other High Courts that a suit for the specific performance of a contract is not barred merely because the aggrieved party does not choose to bring a suit under S. 77, Registration Act, within the prescribed time and I have no hesitation in adopting this view in the present case also.

The second question, that is to say, whether the unregistered sale-deed in favour of the plaintiff can be legally admitted in evidence in this suit is clearly answered by the proviso to S. 49 to which I have already referred. The deed in question is a document affecting immovable property and the proviso clearly states that such a document even though unregistered may be received as evidence of the contract in a suit for its specific performance. Mr. Lal Narain Sinha contends that a deed of sale cannot be treated as a contract for sale and therefore he says the proviso is not applicable to such

a document. Mr. Lal Narain Sinha is of the opinion that his argument is supported by the decision of the Privy Council in 56 I. A. 363⁷ because their Lordships of the Privy Council have referred with approval to 49 Mad. 302² in which the view which he wants us to accept was undoubtedly expressed. There is no doubt that their Lordships referred with approval to 49 Mad. 302² and two other decisions also, namely, 49 Cal. 507⁸ and 50 Bom. 334⁹ but I have no doubt in my mind that they referred to these decisions merely as supporting the view that an agreement for sale of immovable property is a transaction affecting the property within the meaning of S. 49 inasmuch as if carried out, it would bring about a change in ownership; and therefore such a document required registration and was not admissible in evidence under S. 49 as it then stood. They were not called upon to decide whether an unregistered deed of sale could be treated as a contract for sale and they have expressed no opinion on this question.

Once it is held that the question is unaffected by the decision of the Privy Council there can be no difficulty in holding that an incomplete deed of sale may be regarded as a contract for sale. As was pointed out in 7 P.L.T. 730¹ it is not a sufficient performance of the contract of sale for the seller merely to execute a conveyance for until the kebala is registered it is inoperative in law.

"The execution of the kebala not having converted the executory contract into an executed contract, the plaintiff is clearly entitled to a decree directing the defendant to carry it into execution."

There can be no doubt that the obligations into which Budhan entered by executing the document of sale have not been fulfilled and a suit for specific performance does lie in the present case. Section 49 does not say that the unregistered document which is to be admitted in evidence in a suit for specific performance should necessarily be a contract for sale. On the other hand, it provides that "any document affecting immovable property may be received as evidence of a contract in a suit for specific performance." The deed of 4th August 1939 is certainly a document affecting immovable property and is thus receivable in evidence in the present suit. Budhan Mahton has not completed the sale and has not given possession to the plaintiffs, though by the deed on which the

8. (22) 9 A. I. R. 1922 Cal. 436 : 49 Cal. 507 : 69 I.C. 877, Sanjib Chandra v. Santosh Kumar.

9. (26) 13 A.I.R. 1926 Bom. 375 : 50 Bom. 334 : 96 I. C. 334, Ramling Parwatayya v. Bhagwant Sambhuappa.

plaintiffs rely he contracted to do these things. Therefore, the plaintiffs can compel Budhan Mahton to fulfil the contract and I have no doubt in my mind that a suit for specific performance of contract did lie and the unregistered sale-deed was admissible in evidence. In my opinion the decree of the Court below is correct and I would dismiss this appeal with costs.

Sinha J. — I agree.

G.N.

Appeal dismissed.

[*Case No. 21.*]

A. I. R. (33) 1946 Patna 66

FAZL ALI C. J. AND SINHA J.

Chandra Narayan Deo — Appellant

v.

Ramchandra Serawgi — Respondent.

Second Appeal No. 647 of 1944, Decided on 8th May 1945, from decree of Addl. Sub-Judge, Hazaribagh, D/- 6th March 1944.

(a) Succession Act (1925), S. 308 — Power of executor — Executor borrowing money for benefit of estate, though not authorised by will—Creditor has no right against estate.

Where an executor or his attorney borrows money for the benefit of an estate without any authority in that behalf contained in the will itself, the creditor has no right against the estate : ('32) 19 A. I. R. 1932 Cal. 182, *Rel. on.*

[P 67 C 2; P 68 C 1]

(b) Evidence Act (1872), S. 114 — Inference against litigant as to contents of document in his possession when cannot be drawn.

It is open to a litigant to refrain from producing any documents which he considers irrelevant, and that, if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he, nor the Court at his suggestion, is entitled to draw any inference as to the contents of any such documents : ('15) 2 A.I.R. 1915 P. C. 96, *Foll.* [P 68 C 1]

K. P. Upadhyay ; R. P. Singh and B. B. Saran — for Appellant.

G. C. Mukherji — for Respondent.

Sinha J. — This is an appeal from the concurrent decisions of the Courts below decreeing the plaintiff-respondent's suit for recovery of Rupees 2200 on the basis of a promissory note executed in the following circumstances. Thakur Sri Pratap Narayan Deo was the proprietor of the Lakshmipur Estate in the district of Bhagalpur. He appears to have been a much married man, having married five ladies in succession, and died leaving him surviving all those ladies as his widows, but no male child. He left a will, authorising his seniormost widow, who

was impleaded as defendant 1 in this suit, to make an adoption of a son to him. She adopted Thakur Chandra Narayan Deo, defendant 2 in this suit, whose father was Thakur Sahdeo Narayan Deo. The will was proved, and the seniormost widow aforesaid, Thakurain Kusum Kumari Devi, was appointed the administratrix of the estate. She appointed Thakur Sahdeo Narayan Deo aforesaid as her man of business with a power-of-attorney. The plaintiff's case is that Sahdeo Narayan Deo borrowed rupees 1100 in cash from the plaintiff for the benefit of the Lakshmipur Estate on the basis of a handnote, dated 14th August 1932, agreeing to pay interest at three per cent. per mensem. The plaintiff also alleged that he paid Rs. 10 on each of the three dates with a view to saving limitation, namely, on 10th July 1935, 9th July 1938 and 5th September 1938, making endorsements of payment on the back of the handnote itself. The suit was instituted on 4th September 1941, that is, on the last day of limitation, treating the alleged payment of Rs. 10 on 5th September 1938, as the starting point of limitation. The claim was limited to double the principal sum advanced, though on accounting, the plaintiff alleged, he was entitled to a much larger sum. The suit was contested by defendant 2 on the ground that it was barred by limitation; that Thakur Sahdeo Narayan Deo had no power to borrow the money on behalf of defendant 1 or defendant 2, as he had no such authority under any general power-of-attorney, nor did he, as a matter of fact, borrow Rs. 1100 on 14th August 1932, as alleged by the plaintiff; that there was no necessity or occasion for borrowing, inasmuch as the estate had sufficient funds in its hands; that, on enquiry, it had been found that the said Thakur Sahdeo borrowed Rs. 1700 from the plaintiff in September 1929, for his own personal use; and that he paid Rs. 2500 on 14th August 1932, towards the aforesaid dues in respect of principal and interest, and executed the handnote sued upon for the remaining sum of Rs. 1100. It was thus clearly denied on behalf of the defendant that the money had been borrowed by Thakur Sahdeo Narayan Deo on behalf, and for the benefit, of the estate of the defendant, and that he had any authority to borrow any sum on behalf of the estate. Relief was also sought under the Bihar Money-Lenders Act. It was also denied that Thakur Sahdeo Narayan Deo had made any endorsements on the handnote or that he made any such endorsements holding a

general power-of-attorney on behalf of defendant 1. It was finally alleged that defendant 1 adopted the contesting defendant 2 in February 1928, and that, under the orders of the High Court passed in Miscellaneous Judicial Case No. 60 of 1937, dated 9th December 1937, defendant 2 came in possession of his estate, and that thereafter his mother had no authority to borrow money on behalf of the estate or to authorise any other person to do so. Defendant 3 put in a formal written statement, denying his liability and praying that the suit be dismissed as against him, as he had been unnecessarily impleaded.

On the question of the liability of the estate, both the Courts below have practically thrown the burden of proof on the contesting defendant to prove that there was no authority in Thakur Sahdeo Narayan Deo to borrow the money or that the borrowing was not for a justifying necessity of the estate. They have drawn an adverse inference against the defendant from the non-production of the account books and of the power-of-attorney. Hence, they came to the conclusion that the evidence of the plaintiff's single witness proved the plaintiff's case of borrowing by Thakur Sahdeo Narayan Deo on behalf of the estate, and for the benefit of the estate. On the question of limitation both of them took the view that the order of the High Court (Ex. A) did not affect the question of limitation. The trial Court passed a decree against defendants 1 and 2 both. But, on appeal, the learned Subordinate Judge modified the judgment and decree of the trial Court by exonerating defendant 1 and confining the decree as against defendant 2 only. Hence this second appeal on behalf of defendant 2. It may be noted that the other defendants are not parties to this second appeal, the sole respondent being the plaintiff in the suit.

The first question that arises for consideration in this case is whether the borrowing by Thakur Sahdeo Narayan Deo can bind the estate. In this connexion it may be recalled that Thakurain Kusum Kumari Devi, the adoptive mother of the defendant-appellant, was appointed administratrix by the High Court. On attaining majority, the appellant made an application to this Court for being placed in charge of the estate in pursuance of the directions contained in the will of his adoptive father. This Court, after considering the grounds of objection raised on behalf of Thakurain Kusum Kumari Devi, passed the following order :

"We have power under S. 302, Succession Act, to direct the administratrix to hand over the property or to administer the property according to such general or special directions in regard to the estate as we may think fit in the circumstances ; and the fact that the adopted minor son has now attained majority is sufficient and good reason for us to direct that the lady as administratrix do hand over possession of the estate to the minor son and with regard to the future liability as administratrix after such handing over and after accounts are settled she will be discharged from liability."

It is not denied—as a matter of fact, it has been assumed by the Courts below—that the appellant came in possession of the estate in pursuance of this Court's order, quoted above. Now, the question arises whether the borrowing by Thakur Sahdeo Narayan Deo, assuming it to have been for the benefit of the estate, as the general attorney on behalf of Thakurain Kusum Kumari could bind the estate. A Division Bench of the Calcutta High Court in 59 Cal. 216¹ has considered the question in great detail with reference to the English and Indian authorities on the subject, and has come to the conclusion that where an executor borrows money in that capacity without any authority in that behalf contained in the will itself and without creating a valid charge on any portion of the property, and the estate is benefited by the borrowing, the highest right that the creditor can claim against the estate is the right to be subrogated to the right of the executor to be indemnified out of the estate to the necessary extent, and, unless the right of the executor to the indemnity is established, the creditor has none against the estate itself. In the present case there is no evidence whether the will of the late proprietor of the Lakshmipur Estate contained any sanction authorising defendant 1 or any of his other widows to borrow money for the benefit of the estate ; nor is there any direct evidence of the fact that the lady had authorised the executant of the handnote, Thakur Sahdeo Narayan Deo, by the power-of-attorney granted in his favour or that the money was utilised for the purposes of the estate. The Courts below have decreed the suit relying upon the presumption to be drawn against the defendant from the non-production of account books of the estate and of the power-of-attorney, assuming that that document is in possession or control of the contesting defendant. In this connexion reference may be made to the observations of

1. (32) 19 A. I. R. 1932 Cal. 182 : 59 Cal. 216 : 136 I. C. 893, *Shish Chandra Nandi v. Sudhirkrishna Banerji*.

their Lordships of the Judicial Committee in 37 ALL. 557² to the effect that it is open to a litigant to refrain from producing any documents which he considers irrelevant, and that, if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. Their Lordships further point out that, if he fails to do so, neither he, nor the Court at his suggestion, is entitled to draw any inference as to the contents of any such documents. There is no evidence in this case that the defendants or any of them were called upon to produce any such documents as are made the subject-matter of an adverse inference against the appellant. Be that as it may, it must be held, on the authority of the ruling of the Calcutta High Court, referred to above, that neither the defendant-appellant nor his estate is liable for the money sought to be recovered from them. This is not a suit of the nature indicated in that ruling of the Calcutta High Court, namely, to establish the right to be subrogated to the right of the administratrix to be indemnified out of the estate in the hands of defendant 1 or defendant 2. Mr. G. C. Mukherji on behalf of the plaintiff-respondent contended that the administratrix had not been removed by the order of the High Court, nor discharged. I am not sure whether this contention is correct. But, even assuming that this contention is correct, the plaintiff could get a relief only against the estate in her hands, if he had framed his suit and made the necessary allegations in his plaint on that basis; but, as already indicated, the suit is a simple one for money on the basis of the handnote aforesaid. In such a suit it is not possible to grant the appropriate relief; nor it is possible at this late stage to convert the simple money suit into one for enforcing the indemnity by right of subrogation which the plaintiff might possibly claim. It may also be stated that no such application for amendment of the pleadings had been made before us, assuming that it could be granted.

On the question of limitation also, the plaintiff's suit must fail. The suit can be held to be within time only if it can be shown that the endorsement of payment made on 5th September 1938, had been made by the duly authorised agent of the adminis-

tratrix in that behalf. But it has not been shown by the plaintiff that the administratrix was there in charge of the estate on 5th September 1938, that is to say, even after the High Court had directed her to make over charge of the estate to the defendant-appellant nor is there any evidence to the effect that the administratrix, or the contesting defendant, had authorised the said Thakur Sahdeo Narayan Deo to make the part payments and the endorsements extending the period of limitation.

In my judgment, for the reasons aforesaid, the suit should have been dismissed, and the judgment and the decree to the contrary passed by the Courts below are erroneous in law. The appeal is accordingly allowed, and the suit dismissed with costs throughout.

Fazl Ali C. J. — I agree.

V. B.

Appeal allowed.

[Case No. 22.]

* **A. I. R. (33) 1946 Patna 68**

FAZL ALI C. J. AND MANOHAR LALL J.

Commissioner of Income-tax, B. & O.

— Applicant

v.

Jainarain Jagannath — Respondent.

Misc. Judicial Case No. 8 of 1945, Decided on 15th August 1945.

*Income-tax Act (1922), S. 10 (2) (ix)—Hindu undivided family business — Remuneration to members for services rendered if not unreasonable or excessive and is not device to escape income-tax is legally deductible expense.

The question whether the amount paid to members of a Hindu undivided family by way of remuneration for services rendered in the joint family business can be legitimately deducted in computing the profits of the business will very largely depend upon the particular facts of each case but the amount paid can be legitimately deducted if it is found to be a *bona fide* payment to a *bona fide* employee for services actually rendered by him and is not excessive or unreasonable and is not a device to escape the income-tax : *Case law referred.*

[P 68 C 2 ; P 69 C 2 ; P 70 C 1]

S. N. Dutt — for Applicant.

S. K. Mazumdar — for Respondent.

Fazl Ali C. J. — This case has been referred to us under S. 66 (1), Income-tax Act, on the application of the Commissioner of Income-tax for the decision of the following question :

"Can the amount paid to members of a Hindu undivided family by way of remuneration for services rendered in the business of the family be, legitimately deducted in computing the profit of the business.."

The assessee in this case is a Hindu undivided family which, it is stated in the order

2. (15) 2 A. I. R. 1915 P. C. 96 : 37 All. 557 : 42 I. A. 202 : 30 I. C. 299 (P. C.), *Mt. Bilas Kunwar v. Desraj Ranjit Singh*.

of the Income-tax Officer, is the biggest wholesale dealer in grain and grocery in the district of Manbhum. It appears that several members of this family worked in the business carried on by the family and a sum of Rs. 8,901 was paid to them, the payments being described as salary. The Tribunal has found that the sum paid as salary was not excessive or unreasonable and this finding is borne out by the fact that the gross profits made by the family during the year was Rs. 17,42,182. The assessee's claim was that the whole of the sum should be deducted in computing the profits of the business, whereas it was contended on behalf of the Income-tax department that this claim should be disallowed on the ground that the payments in question amounted to distribution of profits among the members of the family. The Tribunal has upheld the assessee's contention.

In 7 I. T. C. 20¹ the question referred to the Calcutta High Court in 1933 was whether the remuneration paid to the members of a Hindu undivided family was to be assessed as an income of the individual members or as an income of the family, but since the Commissioner found as a fact in that case that the alleged salaries were not *bona fide* payments to *bona fide* employees of the business but merely a device to escape income-tax, the High Court returned the reference as not raising any question of law and hence incompetent. No other case involving the precise question which arises now before us has been brought to our notice, but a similar question, namely, as to whether, and, if so, under what circumstances salaries paid to the partners of a firm are admissible deductions has been raised and decided in a number of cases and some of these may be usefully referred to here. In 1 I. T. C. 176² it was held that on the facts there stated by the Commissioner the drawings of the partners by whatever name they were described were part of the profits and therefore taxable. In 4 I. T. C. 171³ it was held by the Nagpur High Court that remuneration paid to a partner doing business in his individual capacity for services rendered to the firm would be a legitimate deduction from the assessable income of the firm; but sums paid to a partner as

such styled commission, pagdi (bonus or present) or by any other name would be simply the profits of the firm appropriated among the owners after they had been earned. Again it was held by the Lahore High Court in 5 I. T. C. 254⁴ that salary charged by working partners in a firm would be admissible as a deduction in the computation of the profits of the firm under S. 10 (2) (ix) if those partners were true employees and the payment of salary to them was *bona fide* and not a device to escape income-tax. The learned Judges who decided the case went on to say that whether the particular partners were in fact true employees or whether the payments of salary were a device to escape income-tax was a question of fact to be decided by the Commissioner. These decisions, in my opinion, lay down the general principle in correct terms though they are now more or less of an academic interest only, in so far as partnerships governed by the Partnership Act are concerned inasmuch as provision has been inserted in the present Act disallowing "any allowance in respect or any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm" (see S. 10, cl. (4), sub-cl. (b)). It was contended by the learned counsel for the Income-tax department that in view of this provision the question referred to us must be answered in the negative; but I do not agree with this contention. The new provision must be read with S. 2, sub-cl. (6B) which states that "firm," "partner" "partnership" have the same meanings respectively as in the Partnership Act of 1932. No distinct provision has yet been made about Hindu joint family trading firms to which the Partnership Act does not apply and in my judgment, the principles underlying the decisions to which I have referred are still applicable to them. In my opinion the true position has been correctly stated by the Tribunal in these words :

"In a Hindu undivided family no member is bound to work in the business of the Hindu undivided family and if an allowance has been made to a junior member on contractual basis for actual work done and the amount is not excessive and is reasonable, the amount paid is allowable as a deduction."

A member of a joint family might conceivably do business in his individual capacity and in that capacity might render services to the joint family trading firm in consi-

1. ('33) 7 I. T. C. 20 (Cal.), B. K. Paul & Co. v. Commr. of Income-tax, Bengal.

2. ('22) 1 I. T. C. 176 (Mad.), B. S. Mining Co. v. Commr. of Income-tax, Madras.

3. ('29) 4 I. T. C. 171 (Nag.), Ramkrishna Ramnath Firm of Tirora v. Commr. of Income-tax, C. P. & Berar.

4. ('31) 18 A. I. R. 1931 Lah. 341 : 12 Lah. 663 : 134 I. C. 198 : 5 I. T. C. 254, Electric and Dental Stores v. Commr. of Income-tax, Punjab.

deration of which the firm might pay him such remuneration as it would pay to an outsider. If such remuneration is not excessive and is reasonable and is not a device to escape income-tax, then it will be a legitimate deduction. If, on the other hand, the amount paid to an individual member of a family is unreasonably high and disproportionate to the services rendered by him, then it may be treated as part of the profits of the firm distributed in a particular manner. In my opinion in view of the findings arrived at by the Tribunal the sum in question must be held to have been legitimately deducted, but as the question which has been formulated by the Tribunal is in general terms, I would answer it by saying that the exact reply to the question will very largely depend upon the facts of each case but the amount paid can be legitimately deducted if it is found to be a *bona fide* payment to a *bona fide* employee for services actually rendered and is not excessive or unreasonable and is not a device to escape the income-tax. The costs of the reference will be borne by the department. The assessee will be entitled to his costs which we assess at Rs. 250.

Manohar Lall J. — I agree.

R.K.

Reference answered.

[Case No. 23.]

A. I. R. (33) 1946 Patna 70

FAZL ALI C. J. AND RAY J.

Nagarchand Goenka — Defendant — Appellant

v,

Surendra Nath Sarkar — Plaintiff — Respondent.

Appeal No. 118 of 1945, Decided on 7th August 1945, from original order of Sub-Judge, Purnea, D/- 9th March 1945.

(a) Arbitration Act (1940), Ss. 20 and 41 (b) — Application under S. 20 (1) — Notices under S. 20 (3) not served — Court has jurisdiction to appoint Receiver.

In a proceeding under the Arbitration Act, the Court has got power to appoint a Receiver when an application under S. 20 (1) has been made, even though no notices have been served on the parties as required under S. 20 (3) and though the proceedings have not become arbitration proceedings.

Held, on facts and in the circumstances of the case, that the order appointing a Receiver was quite justified. [P 72 C 1, 2; P 73 C 1, 2]

(b) Arbitration Act (1940), S. 20 (5) — 'Arbitration' — Scope of.

The word 'arbitration' occurring after the word 'thereafter' in sub-s. (5) of S. 20 means the arbitration by the arbitrator or arbitrators appointed in accordance with the provisions of the preceding sub-s. (4). [P 73 C 2]

Baldeva Sahay — for Appellant.

B. C. De — for Respondent.

Ray J. — This is the defendant's appeal against an order appointing a Receiver of a partnership business constituted under circumstances hereafter described. This order was passed on the application of the plaintiff in a proceeding under S. 20, Arbitration Act (10 [X] of 1940). The facts giving rise to the cause of action for the plaintiff-respondent's suit are shortly these: The plaintiff, Surendra Nath Sarkar, is the sole and absolute proprietor of several business concerns known as the Galgalia Rice Mills at Islampur, P. S. Islampur and the Jute Presses at Galgalia, Thakurganj and Islampur, District Purnea. The defendant Nagarchand Goenka is a big business man being the proprietor of several other concerns. For better management of the plaintiff's business, the parties entered into a partnership on and from 9th February 1943, for a period of three years. The terms of the partnership were later incorporated into a deed which was fully executed and registered by both parties on 4th June 1943, and the firm name and style of the partnership was adopted as Galgalia Rice and Oil Mills and N. C. Rice Mills. According to the terms of the partnership, the present appellant was left in the sole and absolute charge of the business being entirely responsible for the efficient and smooth management thereof and thus became the managing partner. By the terms of the said partnership the respondent was not ordinarily to interfere in the management of the partnership firm.

Some very important terms of the partnership relevant for the purposes of this case are set out herein below: (a) That each of the partners was to contribute Rs. 1,51,000 towards the working capital of the business within a prescribed time; (b) That the managing partner Goenka would get a budget estimate duly prepared and have the same approved by the plaintiff; (c) That Goenka would furnish Sarkar every month with abstracts of accounts; (d) That Goenka should every year prepare a profit and loss statement of the business and submit the same to Sarkar for scrutiny; (e) That the accounts of the firm should be duly adjusted and audited within the time mentioned in the deed; (f) That none of the partners should utilise any asset or goodwill of the firm in connexion with any other business of similar nature either on their own account or on behalf of any other person, firm or company; and that according

to para. 20 of the partnership deed, it is provided that if any of the partners committed any breach, non-observance or non-performance of any of the terms of the partnership, the other partner should give him notice requiring him to make amends within a month of the receipt thereof, and in case the breaches, etc., are not remedied, the partner aggrieved might, notwithstanding anything contained in the deed, forthwith determine the partnership by notice in writing and on such determination the firm should be deemed to stand dissolved.

In pursuance to the arrangement between the parties, the plaintiff paid Rs. 1,51,000 as agreed upon towards the fund for capital outlay of the business. The defendant appellant entered into management without any interference by the plaintiff-respondent. Sometime after the plaintiff came to discover that the defendant did not comply with the partnership covenants. This led to acute differences between the parties in consequence whereof the plaintiff by a notice dated 13th November 1944, called upon the defendant to make amends for his defaults in observance of the terms of the partnership within the prescribed time.

It is then alleged that notwithstanding his notice, the appellant failed to make necessary amends, and hence the respondent exercised his right of determining the partnership by a written notice, and that the partnership, therefore, stands dissolved. The plaintiff thereupon started the proceeding. Thinking that he could not institute a suit for dissolution of partnership and winding up of the business under the provisions of the Indian Partnership Act inasmuch as according to Art. 26 of the deed of partnership it was agreed as between them that any dispute or difference which may arise between them with regard to the construction, meaning and effect of these presents or any part thereof or respecting the accounts profits or losses of the business or the rights and liabilities of the partners under these presents or the dissolution or winding up of the business or any other matter relating to the firm or its affairs, shall be referred to arbitration in accordance with the provisions of the Arbitration Act or any other law for the time being in force. Along with the petition for reference to arbitration which has since been registered as a plaint, the respondent filed an application for appointment of a Receiver to take charge of the business pending disposal of the case and the learned Subordinate Judge appointed a

Receiver by his ex parte order dated 13th January 1945. The appellant on receipt of a notice later appeared and put in his objection against such appointment, and the learned Subordinate Judge after hearing both parties has passed the order under appeal on 9th March 1945. The defendant has, therefore, preferred this appeal.

The following contentions were urged before us, viz., (1) that in a proceeding under the Arbitration Act the Court has no jurisdiction to appoint a Receiver until actual reference to arbitration is made, or, in other words, until the arbitration actually commences; (2) that there could be no dissolution of the partnership except by a regular suit under the Partnership Act and (3) that the facts and circumstances of the case do not make out sufficient cause for holding that it is just and convenient to appoint a Receiver.

I shall take up the last ground first. Mr. Baldeo Sahay appearing for the appellant urges that there is no finding recorded by the Subordinate Judge of any dishonest conduct on the part of his client in relation to his management of the business, nor is there any finding that continuance of the management in his hands will tend to deteriorate, destroy or otherwise cause any irreparable injury to the business, and that in any view of the case, there being a clause in the deed of partnership by which the aggrieved partner, namely, the respondent can be compensated by damages, there is no good ground for dispossessing the appellant from the management of the business. The appellant being a very substantial man of great business dexterity, the business is safe in his hands and also the interest of the respondent. He further contended very strongly that the appointment of a practising pleader as Receiver of business concerns like those of the present is simply unwise and detrimental to the interest of his client who, having invested Rs. 1,51,000 as a part of his capital outlay for the management of this business, expects good outturn.

True it is that the parties have not gone into evidence before the Subordinate Judge, nor has he given any definite finding with regard to the allegations and counter-allegations of the parties in relation to the charges levelled against the appellant's management. And the Subordinate Judge, relying upon the admissions of the parties and certain documents the genuineness of which has not been challenged either before him or before us, has come to his own conclusion that

prima facie there are sufficient grounds to prove that it would be dangerous to allow the appellant to continue in charge of the business. He, therefore, holds that it is nothing but just and convenient to appoint a Receiver under the circumstances of this case. I entirely agree with his conclusions. Non-observance of certain very important terms in the deed of partnership such as (1) failure to prepare a budget and to secure approval thereof by the respondent, (2) default in submitting monthly abstracts of accounts, (3) failure to prepare annual statement of profit and loss, (4) omission to get the accounts audited by the auditor named in the partnership deed is admitted by the appellant, but he gives some reasons which are advanced by way of explaining the breaches of covenants, namely, that on account of war conditions and the mills being under the absolute control of the Government and their being engaged to perform Government contracts in purchasing paddy and supplying milled rice, the conditions could not be observed. The explanation is not at all convincing. I am inclined to think that, on the contrary, if the entire business carried on by the firm is controlled by the Government agencies, there should be no place for black marketting and there should be no uncertainty about the details of the business and it would be rather easier to fulfill the terms and conditions of the partnership deed. In a big business concern like this non-observance of the above conditions raises grave suspicion as to the honesty of the partner in charge. It would not be profitable for the appellant, so far as his chance of success before the arbitrator is concerned that the Court should come to any definite finding at this stage as to the charges laid at his door by the respondent. Nor is it advisable to convert a summary proceeding like the present one into a regular trial.

Besides mere breaches and non-observance of the terms of the partnership, there are certain charges of dishonesty too against the appellant. I will mention only one such as will be quite sufficient for the purpose of coming to a decision in this appeal. It is said that the manager of the Goenka Company, a business concern belonging to the appellant, in his own individual capacity having nothing to do with the present partnership concern, took on giving a receipt 50,000 bags of rice from the firm Galgalia Rice Mills. The receipt is in favour of the manager of the Galgalia Rice Mills, but no price is paid to them. The respondent hav-

ing come to know of this started corresponding with the Goenka Company for payment of the price, and the reply was that the receipt had been granted under a misconception, and no rice had in fact been taken from the Galgalia Rice Mills. Mr. Baldeo Sahay urges that it is impossible that 50,000 bags of rice could be taken from Galgalia railway station without there being permits for wagons and without there being other accounts of the railway company showing the transport and that the rice concerned was in fact purchased by the Goenka Company from various other places and the accounts of the mills do not show that in fact the rice was so taken. Mr. Sahay fails to notice that the entire business being under the absolute control of his client and the accounts being of his own making and the place, time and manner of transport being quite unknown to the respondent, it was not possible for him particularly, at this stage, and in a summary proceeding like this, to prove more than producing the receipt of the manager of the Goenka Company the genuineness of which is not challenged either in the Court below or here before us. It is needless to come to any definite finding as to whether the rice had in fact been taken without payment of price from the Galgalia Rice Mills. This is a matter which will be dealt with by the arbitrator in course of winding up of the partnership business. But it remains quite certain that the transaction is shrouded in mystery and the incident lends a great support to the apprehension of the respondent that the business will deteriorate irreparably to his utter loss if the management of the defendant continues.

The apprehension that the business may suffer to some extent in the hands of practising lawyer on account of his absence of business skill may not be quite unfounded, but the redeeming feature in this case is that it is freely admitted at the bar that the mills are employed solely in turning out contracts of the Government, and the business, therefore, being of a certain and stereotyped character does not require much skill. It is also to be borne in mind that in view of the very strange feelings between the parties, it would be unsafe, so far as the interest of the respondent is concerned, to put the mills in charge of the appellant who is only a working partner and has no interest in the mills, machines, machineries, buildings, structures etc., which it is alleged are worth about 5 lakhs. In my view, therefore, so far as the facts and circumstances

of this case go, it is nothing but just and convenient to appoint a Receiver.

I shall now deal with the point of law raised by Mr. Baldeo Sahay which if correct will go to the very root of the matter. He challenges the Court's jurisdiction to appoint a Receiver at this stage of the proceeding. He contends that it is according to S. 41 (b), Arbitration Act (10 [X] of 1940) that the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in Sch. 2 as it has for the purpose of, and in relation to, any proceedings before the Court. The appointment of a Receiver being enumerated in cl. (4) of Sch. 2, he argues that the power to appoint a Receiver accrues only after the proceeding becomes an arbitration proceeding within the meaning of this section. According to him a proceeding becomes an arbitration proceeding not with the commencement of filing an application under S. 20 of the Act but only after notice of such an application is given to all parties concerned, and where no sufficient cause is shown, the Court orders an agreement to be filed and makes an order of reference to the arbitrators appointed by the parties or otherwise. For this contention of his he relies upon sub-s. (3), (4) and (5) of S. 20 and lays stress upon the word "Thereafter" with which sub-s. (5) begins. Sub-section 5 reads:

"Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

"Thereafter" has certainly reference to the previous sub-clauses which in substance say that as soon as an application in writing is filed under S. 20 of the Act, it shall be numbered and registered as a suit between one or more parties; on such an application being made, the Court shall direct notice thereof to be given to the parties concerned to show cause within the time specified and when no cause is shown a reference is made to the arbitrators. This is a contention with which I am unable to agree. This amounts to putting a very narrow construction on the words "arbitration proceedings" in S. 41 (b). The proceeding is initiated according to S. 20 by the filing of an application in writing when the conditions requisite in sub-s. (1) of S. 20 arises. That sub-section leaves no room for doubt that the object of the proceeding is to enforce an agreement for arbitration with respect to the subject-matter of the agreement or any part of it in case of

differences or disputes between the parties. Therefore, it is a proceeding for arbitration from the very start. The word "arbitration" occurring after the word "thereafter" in sub-s. (5) means the arbitration by the arbitrator or arbitrators appointed in accordance with the provisions of the preceding sub-s. (4). Furthermore, there is a great danger in putting such a narrow construction upon the words "arbitration proceedings." Because if the contention of Mr. Baldeo Sahay is accepted, the Court will be completely powerless to pass any order for the preservation or safety of the properties in dispute involved in the subject-matter of the agreement for arbitration, and the opposite party may take his own time in showing cause why the agreement should not be filed and reference should not be made to the arbitrators by which time the entire property may be completely wasted. In that case there will be no point in empowering the Court either to appoint an arbitrator or to pass an order of injunction by way of saving the property concerned long after the proceeding began. I am, therefore, of opinion that this contention of the appellant's learned advocate has no force.

The other contention of law is that the plaintiff in order to attract the provisions enabling him to get a Receiver appointed during the pendency of the suit should have filed a suit for dissolution of partnership under the Partnership Act. He, not having done so, cannot get the Court exercise the power of appointing a Receiver. The fate of this contention depends upon that of the other one that I have just now dealt with. Besides, it is noticeable that the parties having agreed to refer their dispute about, amongst other matters, dissolution of the partnership, any suit except through the machinery provided in the Arbitration Act is barred under S. 34, Arbitration Act. The present proceeding is one for dissolution of the partnership through the arbitration proceedings controlled by the Court. The distinction between this suit and a suit under the Partnership Act for dissolution is a mere matter of form and not of substance. This contention, therefore, also fails. It has further to be noticed that the contracted partnership being for three years only, it is to terminate automatically by 9th February next, and therefore the balance of convenience is in favour of maintaining the present state of things. Any change for a short period may prove injurious to the business or in the long run complicate matters relating to termination of partner-

ship. In the result, I would dismiss this appeal with costs and uphold the order of the learned Subordinate Judge.

Fazl Ali C. J.—I agree.

V.B.

Appeal dismissed.

[Case No. 24.]

A. I. R. (33) 1946 Patna 74

FAZL ALI C. J. AND RAY J.

Ram Raj Chaudhury and another
Petitioners

v.

Emperor.

Criminal Revn. No. 807 of 1945, Decided on 26th July 1945, from order of Sessions Judge, Shahabad, D/- 25th April 1945.

Penal Code (1860), S. 212—Section 212 does not apply where person harboured is not known to be criminal.

Section 212 applies to the harbouring of persons who have actually committed an offence. It does not apply to the harbouring of persons not being criminals, who merely abscond to avoid or delay a judicial investigation. Therefore, where there is no evidence showing that the accused knew or had reason to believe that the person harboured had committed any offence, he cannot be convicted under S. 212. [P 74 C 2]

Penal Code —

(45) Ratan Lal, S. 212, N. 2, P. 528.

(36) Gour, S. 212, N. 2324, P. 747.

Mrs. Dharmshila Lall—for Petitioners.

Government Pleader—for the Crown.

Fazl Ali C. J. — The petitioners have been convicted under S. 212, Penal Code, and sentenced to one year's rigorous imprisonment on a charge of harbouring one Prithvi Ahir, who is said to have been concerned in a serious dacoity committed in July 1942, with the intention of screening him from legal punishment. From the judgments of the Courts below, it appears that the Sub-Inspector in charge of Nawanagar police-station, having received confidential information that Prithvi Ahir was concealing himself in village Barasar, proceeded to that village, and at about 2 A. M. he found Prithvi Ahir and three others including the two petitioners sleeping in a *marai* in front of the house of the accused. According to the prosecution, the *marai* belonged to the petitioners, and, though the evidence on the point is not conclusive, it may for the purpose of deciding this application be assumed that the petitioners were its owners. The crucial question in this case is whether the petitioners knew or had reason to believe that Prithvi had committed an offence of dacoity. Neither of the Courts below has referred to any direct evidence on this

point, but they have merely inferred from certain circumstances that the petitioners must have known that Prithvi was concerned in the alleged dacoity. The learned Sessions Judge in dealing with this matter observes :

"This man Prithvi, it appears, belongs to Shahpur jurisdiction, but it can hardly be supposed from the place and circumstances in which he was arrested that the accused were unaware of his identity or antecedents. The evidence is that both the appellants were found sleeping along with Prithvi and Joga Kandu in the same *marai*. It is inconceivable that Prithvi would thus have been sheltered by the accused in their *marai* if he was merely a stranger to them; and there can be no doubt, in my opinion, in all these circumstances that the appellants knew that he was a proclaimed absconder and had knowingly harboured him in their *marai*."

The learned Sessions Judge has put the prosecution case at its highest but, in my opinion, the circumstances referred to by him do not conclusively show that the petitioners knew, or had reason to believe that Prithvi had committed a dacoity. It has been pointed out in a number of cases that S. 212 applies to the harbouring of persons who have actually committed an offence, and it does not apply to the harbouring of persons not being criminals, who merely abscond to avoid or delay a judicial investigation. There is really no clear evidence to show that the petitioners knew that Prithvi was a proclaimed absconder. But even if they did, it does not follow that they knew that he had in fact committed an offence of dacoity. The point which arises in this case arose in another case in this Court, which related to the conviction of one Jang Bahadur; and Meredith J. dealt with it in this way :

"There is another aspect of the case which has been lost sight of by the Courts below. The prosecution was premature. Section 212 says nothing about the harbouring of an absconder or an accused person. It renders punishable only the harbouring of a person when it is known or there is reason to believe that he is the offender. The first thing to be proved in a case under this section is that an offence has been committed by the person harboured. Jang Bahadur's trial, however, has not yet been concluded. Until actually convicted, he is, like every one else, entitled to the presumption that he is innocent. Only the Court can say in due course whether he is actually an offender or not. The Court has not yet said that ; and until the Court has pronounced upon the fact, a prosecution for harbouring him is clearly premature. The proper course would have been to hold up this case under S. 212 until the conclusion of Jang Bahadur's trial, when it might have proceeded in the event of his conviction, but obviously not otherwise."

I am clearly of the opinion that this conviction cannot be supported, and I would,

therefore, allow this application and set aside the conviction and sentence of the petitioners.

Ray J. — I agree.

V.B.

Order accordingly.

[Case No. 25.]

A. I. R. (33) 1946 Patna 75

VARMA J.

Bansidhar and another — Appellants
v.

Emperor.

Criminal Ref. No. 71 of 1945, Decided on 9th November 1945, made by First Addl. Sessions Judge, Monghyr, D/- 14th September 1945.

Defence of India Rules (1939), R. 81 (4) — Conviction under, read with S. 3, Bihar Cotton Cloth and Yarn Control Order — Delay in giving cash memo in all probability owing to unauthorised intervention of police — Dealer should not be convicted—Penal Code, S. 95.

Where the only fact which could bring the dealer within the mischief of R. 81 (4) was the delay in granting a cash memo next morning instead of on the night of the transaction, which in all probability was caused by the intervention of the Sub-Inspector of Police, who was not authorised to take steps in the matter, the dealer should not be convicted. Section 95, Penal Code, can be utilised in such a case. [P 76 C 1]

Rajkishore Prasad and Ugra Singh —

for the Reference.

Government Pleader — against the Reference.

Order.—The petitioners have been convicted under R. 81 (4), Defence of India Rules, read with S. 3, Bihar Cotton Cloth and Yarn Control Order. The charge against them was that they failed to give cash memo to purchasers Mannu Modi, Govind Modi and Masudan Modi for purchases made by them and thereby committed an offence under R. 81 (4), etc. The date of the occurrence in the charge is 13th February 1945. The prosecution story is that an Assistant Sub-Inspector of Police on getting some report came near the shop of the petitioners and noticed a bullock cart loaded with six bags of cloth said to belong to Mannu Modi of Parsada. The cart was standing in front of Benarsi Modi's shop. The Assistant Sub-Inspector demanded the permit of the Sub-divisional Officer and the cash memo. Mannu Modi could not produce them. Then the Assistant Sub-Inspector seized the cloth in the presence of Benarsi Modi, prepared a list and then took him to the police-station. The Sub-Inspector visited the shop on 14th February 1945. He found that three cash memos were issued. He also got from the petitioners three permits, Exs. 7, 8 and 9 and this was between 8 and 9 A. M. in the

morning of 14th February. The date of occurrence is said to be the previous day between 8 and 8.30 P. M. The learned first Additional Sessions Judge has pointed out certain illegalities in the procedure and recommended that the conviction and sentence should be set aside. In fact he points out that the charge was defective but he himself does not attach much importance to that defect. But then he lays emphasis upon the fact that seizure was by a person not authorised by the law and that the examination of Bansidhar under S. 342, Criminal P. C., through a pleader was not proper. But apart from these grounds, what strikes me is that the condition of the licence, for infringement of which the petitioners have been convicted, runs as follows :

"All licensees (except holder of hawker's licence) shall issue to every customer a correct receipt — cash or credit memo, or invoice, as the case may be, in which is set forth clearly the name, the licence number, police-station, subdivision and district of the licensee as well as the quantity of cloth and/or yard sold, the rate charged, the total amount charged and the date of transaction. A duplicate of each such receipt, memo, or invoice shall be maintained and made available for inspection when required."

Can it be said that the condition has not been satisfied? The trial Court has observed in his judgment :

"It is admitted that the three cash memos Exs. 4, 5 and 6 were issued next morning in accordance with the permits granted by the S. D. O. Exs. 7, 8 and 9. I have examined the three cash memos and I find that as usual, details of each kind of cloth, their quantities and rate of each have been mentioned therein and in fact it must have taken some time to write them out, as each cash memo occupies the whole of a half paper of fool-scape size, perhaps larger. The accused had pleaded that the three dealers were supplied cloth in accordance with the S. D. O.'s permit, and as there was great rush and much work to do, the cash memos could not be issued in the night and they were issued next morning. It is admitted that out of the three dealers, who were supplied the cloth, two remained behind to take the cash memos (which were really Bijaks) and only one, viz., Mamu Modi, was carrying the cloth when he was caught by the police."

Later on he says,

"the facts indicate that the offence has really been of a technical nature and so I take a lenient view of what they have done."

Now, it is not clear as to how long before the police arrived on the scene the transactions had taken place. On the back of the permits themselves there is a sort of receipt noted. The learned Magistrate himself admits that it was a fairly large transaction and the making out of the cash memos must have taken some time. He, however, says that a technical offence has been com-

mitted. But he has lost sight of the fact that when two of the traders remained behind to take the cash memos, the idea was to get them from the petitioners, and it must also be remembered that the arrival of the police must have disturbed the routine work of the shop. The only element upon which stress has been laid in the judgment and by the Government Pleader before me is that the cash memos were not handed over that very night, and for that the coming in of the Assistant Sub-Inspector of Police, who, as the Judge points out, has not been proved to be one of the officers authorised to take steps in such matters, must have contributed towards the delay. The learned Magistrate himself observes that an offence under R. 81 (4), Defence of India Rules, may be of two kinds, (1) deliberate and dishonest refusal to grant a cash memo and (2) failure, which is not dishonest or deliberate under certain extenuating circumstances. He observes that the present case appears to be of the second kind. So, according to the learned Magistrate there was no dishonesty in issuing cash memo and the papers of the shop were found in order. The only fact that could have brought the petitioners within the mischief of the rule was the delay in granting the cash memo, and that delay may well have been caused by the intervention of the Assistant Sub-Inspector at the time or immediately after the transaction took place. In any case, this is not a case in which a conviction should have been recorded against the petitioners. Section 95, Penal Code, may well have been utilised in this case. Therefore, agreeing with the views of the learned Judge, and chiefly on a consideration of the facts mentioned above, I would allow this application, set aside the conviction and sentences against the petitioners and direct that the fines, if paid, be refunded.

V.B.

Convictions set aside.

[Case No. 26.]

A. I. R. (33) 1946 Patna 76

IMAM AND RAY JJ.

Puranmal — Petitioner

v.

Emperor.

Criminal Revn. No. 419 of 1945, Decided on 31st July 1945, from order of Addl. Sessions Judge, Darbhanga, D/- 19th February 1945.

Defence of India Rules (1939), Rr. 81 (4) and 81 (2) (b)—To warrant conviction under R. 81 (4), order under R. 81 (2) (b) fixing price must be exhibited.

For conviction under R. 81 (4), Defence of India Rules, for contravention of an order issued under R. 81 (2) (b), the order is necessary to be exhibited in the case. The mere evidence of the Assistant Price Control Officer and the production of the price-list, in absence of such order, is not legal evidence to warrant conviction. [P 76 C 2]

*K. Dayal — for Petitioner.**Gopal Prasad — for the Crown.*

Order. — The petitioner was convicted under R. 81, cl. (4), Defence of India Rules, and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 200 or in default to suffer rigorous imprisonment for one month. According to the prosecution, the petitioner sold salt and kerosene oil beyond the controlled rate. He has been acquitted of the charge for selling salt beyond the controlled rate, but has been convicted for selling kerosene oil beyond the controlled rate. It is said that he sold oil at five annas per bottle of 22 oz. against the controlled rate of three annas. The learned advocate for the petitioner has urged that the order of the Sub-divisional Magistrate fixing the price beyond which such oil was not to be sold has neither been produced nor exhibited in the case. The prosecution depended upon a so-called price list and the oral testimony of the Assistant Price Control Officer. The learned advocate, therefore, suggests that there is no legal evidence on the record to prove the price fixed by the Sub-divisional Magistrate and he relies upon two decisions of this Court in 24 Pat. 29¹ and 24 Pat. 143.² He has not raised the question as to whether the order of the Sub-divisional Magistrate had been published in a manner prescribed by him, as he argued that the order itself had not been produced. We are of the opinion that there is a lacuna in the prosecution evidence, for the evidence of the Assistant Price Control Officer and the price list cannot take the place of the order of the Sub-divisional officer fixing the price, and it is this order which it is alleged by the prosecution to have been contravened. There is, therefore, on the record no legal evidence to show that when the petitioner sold kerosene oil at five annas per bottle of 22 oz. he had sold it at a rate beyond that fixed in the order made by the Sub-divisional Magistrate. In the circumstances the conviction and sentence must be set aside, and the rule made absolute. The fine if paid will be refunded.

1. ('45) 32 A.I.R. Pat. 307 : 24 Pat. 29, Jagarnath v. Emperor.

2. ('45) 32 A. I. R. 1945 Pat. 210 : 24 Pat. 143 : 219 I. C. 148, Ram Prasad v. Emperor.

Having regard to the view which we take on the facts of this case, it is unnecessary for us to go into the question as to the correctness or otherwise of the decision of this Court in 24 Pat. 29¹ on account of which this case was referred to a larger Bench by Shearer J.

V.B.

Conviction set aside.

[Case No. 27.]

A. I. R. (33) 1946 Patna 77

MANOHAR LALL AND SINHA JJ.

*Kamakshya Narain Singh —**Appellant*

v.

Tara Prasad Bakshi — Respondent.

Appeal No. 216 of 1945, Decided on 14th November 1945, from appellate decree of Addl. Sub-Judge, Hazaribagh, D/- 25th November 1944.

(a) Chota Nagpur Tenancy Act (6 [VI] of 1908), 14 (1) (a)—Lease by grantee of resumable tenure—No evidence that tank on leased land was constructed by grantee — Lessee is not protected by S. 14 (1) (a).

A lessee from the grantee of a resumable tenure cannot claim protection under S. 14 (1) (a) in respect of the tank on the leased land in the absence of evidence to show that the tank was made by the grantee : 12 Cal. 327 and 23 W. R. 387, *Ref.*

[P 78 C 2]

(b) Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 20 (3) proviso — Raiyati settlement of kasht land by grantee of resumable tenure — Raiyat allowed to irrigate land from tank and catch fish — Raiyat cannot claim occupancy rights in tank on termination of interest of grantee.

The fact that a raiyat with whom kasht land has been settled by the grantee of a resumable tenure is allowed to irrigate the kasht land from a tank situate within the resumable tenure and to catch fish therein does not warrant the conclusion that the land upon which the tank is situated was also settled with the raiyat for agricultural purposes so as to confer occupancy rights on him in respect of that land on the termination of the interest of the grantee : ('22) 9 A.I.R. 1922 Pat. 9 and 8 C.W.N. 192, *Disting.*

[P 78 C 2]

L. K. Jha and Shambhu Prasad Singh

— for Appellant.

Sarjoo Prasad, T. K. Prasad and R. P. Katriar — for Respondent.

Manohar Lall J.—In this appeal by the plaintiff the question for consideration is whether the defendant has obtained the right of occupancy in a tank and a *bhinda* in the following circumstances. On 9th Magh 1922 Sambat, corresponding to 1865 the ancestor of the plaintiff granted a mokar-rari istamrari in village Gola to Bakshi Ram Das and Bakshi Loknath Das. It is well settled that such a tenure is resumable upon the death of the grantees. Bakshi Ram Das died several years ago, and Bakshi Loknath Das died in November 1937. The

plaintiff's case is that on the death of Loknath Das, he resumed the village and came into khas possession of all the lands including the suit lands and that he settled the tank and the *bhinda* with one Keshar for three years 1994 to 1996 Sambat. But this lessee was disturbed in possession by the defendant and the dispute was carried to the criminal Courts who decided in favour of the defendant. The defendant's case was that during the subsistence of the mokar-rari tenure the Chota Nagpur Banking Association in execution of their decree against Loknath Das purchased ten annas and eight pies share in this village in the year 1931, and on 20th April 1934 they sold that share to Ramprakash Lal, a pleader of Hazaribagh. On 2nd Asarh 1992 Sambat Ramprakash Lal by means of a hukum-nama settled 5.14 acres of bakasht land, .14 acres of tanr lands and 3.66 acres of *bhinda* and pokhar (the lands in suit) with the defendant Taraprasad Bakshi on taking a salami of Rs. 400 and at a rental of Rs. 4 per annum. The defendant claims that as he was a settled raiyat in this village, he acquired the right of occupancy in 8.94 acres of land including the tank and the *bhinda* because he took the settlement for agricultural purposes. The plaintiff in reply alleges that the purchase from the Chota Nagpur Banking Association was not a purchase by Ramprakash Lal but was a purchase by the defendant's father, Jnardan Das (*sic*), in the farzi name of his sister's husband, Ramprakash Lal. He also alleged that the settlement was not a *bona fide* settlement and in any event no right of occupancy could accrue in the tank and the *bhinda* so as to deprive him of taking possession on resumption of the village.

The Courts below have concurrently found that Ramprakash Lal was the real purchaser and was not a benamidar of the defendant's family. The trial Court also found that this was a *bona fide* raiyati settlement from the date of the hukum-nama although the hukumnama is not available as it has been said to have been lost. As the defendant is found to be a settled raiyat of the village it follows, in the opinion of the Courts below, that he has acquired a right of occupancy. It should be observed here that there is no finding, explicit or implicit, that the settlement was *bona fide* in the judgment of the appellate Court. Hence the appeal on behalf of the plaintiff. As the whole case turned upon the true interpretation of the patta (Ex. 1) we

had it translated by the office. Some of the relevant portions have been correctly reproduced in the judgment of the learned Munisif. It appears, as I have stated above, that the land which was being settled is of three kinds *tanr* *bakasht* land with an area of 5.14 acres, then there is another *tanr* No. 2 and *gairmazrua* land measuring .14 acres, and then the *bhinda* and the *pokhar* measuring 3.66 acres. There are also two *Simar* trees, one *Bel* tree, one *Tamarind* tree, one *Peepal* tree and two *mango* trees apparently on the *bhinda* which were also included in the settlement. The rental of Rs. 4 per annum is ridiculously low even if the *salami* of Rs. 400 is taken into consideration, as the total area of the land which has thus been made available to the defendant is about 9 acres. Again, the settlement was made at a time when *Loknath Das* was very old. In fact, he died within two years of the *hukumnama* and within a few months of the registered *patta*. It is remarkable that the Courts below have not given any consideration to this aspect of the case and confined themselves to the consideration as to whether the purchase by *Ramprakash Lal* was for himself or was a *benami* purchase for the defendant. I must hold that the settlement was not a *bona fide* settlement made by *Ramprakash Lal* who had purchased ten annas and eight pies of the interest of *Loknath Das*.

On behalf of the respondent strenuous argument was advanced before us that by the application of the provisions of Ss. 14 and 20, *Chota Nagpur Tenancy Act*, the defendant cannot be ousted from the tank and the *bhinda*. Attention was drawn to sub-cl. (a) to S. 14 which says *inter alia* that upon the resumption of a resumable tenure no annulment can be made of a lease of land whereon a tank has been made. Assuming that this section applies, there is no finding in the present case that the tank in question was made by *Loknath Das*. A similar provision is to be found in *Exception (4) to S. 37, Land Revenue Sale Law (Act 11 [XI] of 1859)*. With regard to the claim of the protection of a lease of land on which a garden has been made, it has been decided in 23 W. R. 387¹ that S. 37 does not prevent the auction-purchaser from taking possession of a garden planted on the land as there is no authority for the contention that if a zamindar chooses to plant gardens of mango and other trees upon any portion

of his estate he becomes his own raiyat in respect of those plantations and is thus protected under this section. As a contrast see the case in 12 Cal. 327² which decides that if a garden has been subsequently made on such a land then under the provision of cl. (4) to S. 37 the revenue auction-purchaser cannot recover possession of the garden. As in this case it has not been contended or established on behalf of the defendant that the tank was made upon the land in suit by *Loknath Das*, the provisions of S. 14, sub-cl. (1) (a) cannot be of any assistance to the defendant.

But it was argued that as this was a raiyati settlement made for agricultural purposes, the defendant has acquired an occupancy right by reason of the provisions of S. 20, sub-cl. (3). The question, therefore, arises whether upon a true construction of the *patta* the settlement of the suit land was a raiyati settlement for purposes of agriculture. In my opinion, the settlement for agricultural purposes must be confined to the two pieces of *bakasht* lands described as *tanr* lands with an area of 5.28 acres in all. It is stated at page 2 that the raiyat should remain in possession and occupation of the settled raiyati land, cultivate the same in accordance with his sweet will and appropriate all sorts of produce thereof and that he and his heirs will irrigate the *kasht* land with the water of the tank. This shows that the settlement was really of the *kasht* land and a right was given to irrigate the *kasht* land from the tank—the *kasht* land is not the subject of the suit. Reliance was, however, placed upon the subsequent terms of the document which are to the effect that the raiyat shall rear fish, etc., in the pond and shall be entitled to grow all sorts of produce upon the *bhinda*. It was, therefore, argued that the settlement of the *bhinda* land was for agricultural purposes. Even if this is so, I do not see that the land upon which the tank stood has been settled for agricultural purposes. In this view of the matter, the well-known cases in 3 P.L.T. 53³ and 8 C.W.N. 192,⁴ relied upon by the learned advocate for the respondent have no application to the present case. Those cases would have applied if it had been found that the settlement was of the entire area, 8.94 acres, and, therefore, the settlement

2. ('86) 12 Cal. 327, *Gobind Chundra Sen v. Joy Chundra Doss*.

3. ('22) 9 A. I. R. 1922 Pat. 9 : 64 I. C. 346 : 3 P. L. T. 53, *Henry Hill & Co. v. Sheo Raj Rai*.

4. (04) 8 C.W.N. 192, *Uma Charan v. Moni Ram*.

1. ('75) 23 W. R. 387, *Bool Chand Jha v. Luthoo Moodee*.

carried with it the right to catch fish from that part of the land upon which the tank was situated. But here the position is different. The settlement was made only of the kasht land and along with it the right to irrigate the kasht lands from the tank and also the right to catch fish were being given to the defendant.

For the aforesaid reasons, firstly that the settlement with the defendant was not a *bona fide* settlement but was made with a view to deprive the superior landlord from obtaining khas possession, and, secondly because no occupancy right could accrue in the lands covered by the tank and the *bhinda* in this case, I must allow the appeal, set aside the decisions of the Courts below, and decree the suit of the plaintiff with costs in all the Courts.

I omitted to notice another argument advanced by Mr. T. K. Prasad, who carried on the argument with ability on behalf of the defendant on the next day, that the defendant has been allowed to change the features of the land according to his sweet will by building houses and letting out gardens and orchards on the property given in raiyati settlement. He, therefore, argued that this was a case of settlement of the entire land, and, therefore, the defendant acquired an occupancy right. If the terms of the settlement are interpreted in this way, it strengthens the conclusion that the settlement was not a *bona fide* settlement. 3.66 acres of land upon which the tank and the *bhinda* are situated are allowed to be converted into fallow land so that it may either be cultivated or a house may be built upon it or an orchard and a garden may be planted thereon. But I am disposed to take the view that the proper construction of the patta is not that the tank could be annihilated nor that the trees which already stand upon the *bhinda* are to be cut, but so much of the *bhinda* land as could reasonably be not kept parti might be brought into use for purposes of cultivation.

Sinha J. — I agree.

G.N.

Appeal allowed.

[Case No. 28.]

A. I. R. (33) 1946 Patna 79

DAS AND RAY JJ.

Jangli Mian and others — Petitioners
v.
Emperor.

Criminal Revn. No. 517 of 1945, Decided on 10th August 1945, from order of Addl. Deputy Commissioner, Singbhum, D/- 8th February 1945.

Bihar Village Collective Responsibility Act (6 [VI] of 1943), Ss. 7 and 5 (b)— Villagers performing duties according to chart prepared by themselves and not according to chart prepared by headman— Headman not authorised by District Magistrate — Villagers are not liable under S. 7.

Section 5 (b) of the Act has to be read with S. 7. Since S. 7 clearly and specifically refers to a direction given under cl. (b) of S. 5, it is the failure to discharge any protective duty imposed by a direction under S. 5 (b) which is made punishable under S. 7 of the Act. The expression "as the District Magistrate may direct," controls the expressions which precede, namely, "such protective duties and other duties connected with protective duties and at such places and times and for such periods etc." Section 5 (b) requires that the District Magistrate shall direct what protective duties or other connected duties the village headman or members of the village patrols shall perform. The section, no doubt, gives the District Magistrate power to give directions as to supervision and control. But supervision and control do not imply that the District Magistrate can delegate to another authority duties which have to be performed by him. A direction given by a village headman will not be legally valid, in the absence of any authorisation by the District Magistrate and there is no provision in the Act which penalises the failure to carry out a direction given by the village headman. The village headman, therefore, cannot impose his own chart on the villagers without a direction from the District Magistrate as required by cl. (b) of S. 5 of the Act. Hence, if the villagers perform the protective duties imposed on them according to a chart prepared by themselves, but not according to the roster of duties prepared by the village headman, they would not be liable under S. 7. [P 80 C 1, 2; P 81 C 1]

G. C. Mukherji and K. D. De —

for Petitioners.

Gopal Prasad for Government Advocate—

for the Crown.

Das J. — The four petitioners have been found guilty under S. 7, Bihar Village Collective Responsibility Act, 1943. They were originally sentenced to a fine of Rs. 25 each, or in default simple imprisonment for a period of 15 days each. This sentence was reduced in appeal to a fine of Rs. 2 each, or in default simple imprisonment for a period of four days each. The application raises an important question of interpretation of the provisions of S. 5, Bihar Village Collective Responsibility Act, 1943, and the small fine imposed by the Court of appeal below is no indication of the importance of the question raised. The main contention which has been raised on behalf of the four petitioners is that they have not violated any direction given under S. 5 (b) of the Act, and, therefore, they are not liable to punishment under S. 7 of the Act. In order to appreciate the point raised on behalf of the petitioners it is necessary to state the facts very briefly. It appears that in December

1943 the Deputy Commissioner of Singhbhum had passed an order under S. 3, Bihar Village Collective Responsibility Act, 1943. By this order he had directed that the inhabitants of village Geoelkera Bazar shall be responsible for guarding and protecting from destruction, damage, interruption or obstruction the railway line and telegraphs and communications within the village and from mile post 214 to 215 of the B. N. railway main line. Section 3 of the Act empowers the District Magistrate by order to impose collective responsibility on the inhabitants of any particular area. This section merely imposes a collective responsibility on all the inhabitants of that area. By another order passed on the same date, under S. 4 of the Act, the Deputy Commissioner of Singhbhum had appointed one Madhu Prasad as the headman for the aforesaid village. Then, on the same date, there is a third order by the Deputy Commissioner regarding the interpretation of which the parties have been at variance. This third order of the Deputy Commissioner purports to be an order under S. 5 of the Act. It reads as follows :

"Under S. 5, Bihar Village Collective Responsibility Act, 1943, Madhu Prasad is required to provide 36 patrollers from the inhabitants of the above village for patrolling at night. One patrol is to consist of four men and one patrol is to be on duty at one time; the night patrolling is to be shared by three such patrols of four men each for 3½ to 4 hours at a time."

The prosecution case is that in pursuance of the aforesaid order of the Deputy Commissioner the village headman Madhu Prasad had fixed a roster of duties to be performed by some of the members of the village patrol. Admittedly, the petitioners were members of the village patrol. They did not, however, perform the duties, as shown in the roster prepared by the village headman, on 25th June 1944, between the hours 11 P. M. and 2 A. M. It is admitted that the petitioners did perform the protective duties imposed on them according to a chart prepared by themselves, but not according to the roster of duties prepared by the village headman. Therefore, the main question is if the petitioners are liable under S. 7 of the Act for failure to perform protective duties as required by the village headman. The contention on behalf of the petitioners is that they are liable under S. 7 of the Act, only if they violate a direction given under S. 5 (b) of the Act. The District Magistrate not having given any direction under S. 5 (b) of the Act regarding the respective duties of the members of the village patrol, the petitioners

are not liable for punishment under S. 7 of the Act.

In my opinion, the contention raised on behalf of the petitioners is correct and should be accepted. Section 5 (b) of the Act has to be read with S. 7. Section 7 clearly and specifically refers to a direction given under cl. (b) of S. 5. It is the failure to discharge any protective duty imposed by a direction under S. 5 (b) which is made punishable under S. 7 of the Act. Section 5 (b) reads as follows:

"A village headman and the members of the village patrols provided by him shall perform such protective duties and other duties connected with protective duties and at such places and times and for such periods and subject to such supervision and control as the District Magistrate may direct."

It is clear that the expression "as the District Magistrate may direct," controls the expressions which precede, namely, "such protective duties and other duties connected with protective duties and at such places and times and for such periods," etc. Section 5 (b), as I read it, requires that the District Magistrate shall direct what protective duties or other connected duties the village headman or members of the village patrols will perform. The section further requires that the District Magistrate shall direct the places, times and periods at which or for which the duties shall be performed. The section, no doubt, gives the District Magistrate power to give directions as to supervision and control. Supervision and control do not, however, mean that the District Magistrate can delegate to another authority duties which have to be performed by him. There is a separate provision, namely, S. 2 (c) of the Act, which says that the expression "District Magistrate" in the Act includes "any officer whom the District Magistrate may authorise to discharge the functions of the District Magistrate under that provision." In the particular case under our consideration there is no order of authorisation by the District Magistrate by virtue of which the village headman could perform the duties given to the District Magistrate by S. 5 (b) of the Act. I am, therefore, of the view that under the provisions of S. 5 (b) of the Act, it was for the District Magistrate to fix the places, times, periods, etc., at which and during which the members of the village patrols were to perform their protective duties or other duties connected with protective duties. A direction given by a village headman without any authorisation by the District Magistrate will not be legally valid, and there is no provision in the Act

which penalises the failure to carry out a direction given by the village headman.

Learned counsel for the Crown has contended before us that the third order of the Deputy Commissioner, to which I have already made a reference above, should be construed as an order both under clauses (a) and (b) of S. 5 of the Act. It is further contended that if so construed, the failure of the petitioners to comply with the direction given by the village headman would be tantamount to a failure to comply with the direction of the District Magistrate, and would, therefore, be punishable under S. 7 of the Act. The short answer to these contentions is that the third order of the Deputy Commissioner contains no direction to the village headman to fix the roster of duties for the members of the village patrol. The first part of this order of the Deputy Commissioner merely requires the village headman to provide 36 patrollers. Obviously, this part of the order is under clause (a) of S. 5 of the Act. The second part of the order of the Deputy Commissioner no doubt mentions that one patrol is to consist of four men and the night patrolling is to be shared by three patrols of four men each for 3½ to 4 hours at a time. This part of the order cannot, however, be stretched against the petitioners to mean that it authorises the village headman to fix the duties of the village patrol without any direction from the District Magistrate. I am unable to hold that the order of the District Magistrate referred to above, even if it should be construed as an order under cl. (b) of S. 5, gives the village headman the right to fix the places, times, periods, etc., at which protective duties have to be performed by the members of the village patrol. The net result, therefore, is that in this case there was no direction by the District Magistrate fixing the respective duties of the members of the village patrol. It follows, therefore, that the petitioners cannot be held liable under S. 7 of the Act.

It has been rightly pointed out by learned counsel for the petitioners that to leave the fixing of duties to the village headman may be attended with great risk and danger to the inhabitants of a particular village. The village headman may have his own enemies in the village, and he may easily use his power to the disadvantage and inconvenience of his enemies. Section 5 (b) of the Act clearly imposes on the District Magistrate the obligation of fixing the respective duties of the village headman as

well as of the members of the village patrols. The District Magistrate may, no doubt, arrange for whatever supervision or control he considers necessary. But he must himself fix unless he legally authorises somebody else the respective duties of the village headman and the members of the village patrol, and he must also fix the places, times, periods, etc., as required by cl. (b) of S. 5 of the Act. This not having been done in the case under our consideration, one can hardly blame the villagers, if they performed their duties according to a chart prepared by themselves. I do not think the village headman can impose his own chart on the villagers without a direction from the District Magistrate as required by cl. (b) of S. 5 of the Act. For the reasons given above, I would allow this application, and set aside the conviction and sentences passed against the petitioners. The fine, if paid, should be refunded to the petitioners.

Ray J. — I agree.

R.K.

Conviction set aside.

[Case No. 29.]

A. I. R. (33) 1946 Patna 81

AGARWALA J.

Puran Mahton —

Plaintiff — Appellant
v.

Bhogo Mahton and others —

Defendants — Respondents.

Appeal No. 461 of 1944, Decided on 18th September 1945, from appellate decree of Sub-Judge, 3rd Court, Gaya, D/- 2nd March 1944.

Transfer of Property Act (1882), S. 54 — Oral sale to *D* by mortgagor of property usufructually mortgaged — Later on *D* paying and obtaining possession from mortgagee — Subsequent sale by registered deed to *P* — *P* depositing amount for payment to mortgagee — *P* held entitled to possession.

A property was under a usufructuary mortgage in possession of the mortgagee. The mortgagor orally sold the property to *D*. After some days *D* paid the mortgagee and obtained possession from him. The mortgagor subsequently sold the property to *P* by a registered sale-deed. *P* deposited the amount for payment to mortgagee which he refused to accept:

Held, that since possession was delivered to *D* not by the vendor, but by the mortgagee, the only inference to be drawn from the subsequent transfer to *P* would be that the vendor was not a consenting party to the delivery of possession to *D*, and since *P* had already deposited the money due under the mortgage he was entitled to recovery of possession: (28) 15 A. I. R. 1928 All. 726 and 34 Cal. 207, *Rel. on.* [P 82 C 2]

Girijanandan Prasad — for Appellant.

N. K. Prasad (I) and Abu Zafar —

for Respondents.

Judgment. — This is an appeal by the plaintiff. Plot No. 117 of Khata No. 5 in village Rustampore Fateha belonged to Sukar Gope, defendant 12. He executed a usufructuary mortgage in respect of this plot in favour of defendants 2 and 9 for a period of seven years from 1342 to 1348 and put the mortgagees in possession. In 1936 he purported to sell the plot to defendant 10 for Rs. 80. No document was executed or registered in respect of this sale. In 1939 defendant 10 paid off the mortgage of defendants 2 and 9. Thereafter, in 1940, defendant 12 executed a registered sale-deed in favour of the plaintiff for a consideration of Rs. 100. The plaintiff thereupon deposited the mortgagees' dues under S. 83, T. P. Act. As the mortgagees refused to accept this money, stating that the mortgage had already been redeemed by defendant 10 the plaintiff instituted the suit out of which this appeal has arisen for a declaration of his title and for recovery of possession.

The question that arises for decision is whether the sale to defendant 10 passed title in the property to him. Section 54, T. P. Act, provides that a transfer of tangible immovable property of the value less than Rs. 100 may be made either by a registered instrument or by delivery of the property to the transferee. Admittedly there was no registered instrument in favour of defendant 10. At the time of the sale the property was in the possession of the usufructuary mortgagees, and therefore, there could not be, and was not, any delivery of the property to defendant 10 at the date of the alleged sale. It was contended before me on behalf of the defendants respondents that in the case of a property subject to a usufructuary mortgage or other incumbrance delivery of possession within the meaning of S. 54 occurs if the vendor has done all that was necessary to put the vendee in possession of the subject-matter of the transfer. It has, however, been pointed out by a Full Bench of the Allahabad High Court in 50 ALL. 986¹ that property subject to a usufructuary mortgage is incapable of being transferred by a delivery of possession. The same result is deducible from the decision in 34 Cal. 207.² The facts of this latter case were that the transferee was actually in possession from before the date of the sale. It was held that, as in these circum-

stances the vendor could not deliver possession, the plaintiff acquired no title by an oral transfer of the property. Lastly, it was contended that defendant 10 had in fact obtained delivery of possession in 1939 when he deposited the mortgage dues of defendants 2 and 9 which was before the sale to the plaintiff. If the plaintiff's vendor, defendant 12, had been a party to the deposit by defendant 10, it might perhaps have been arguable that he delivered possession to defendant 10; but that was not the fact. Possession in 1939 was delivered to the defendant, not by the vendor, but by the mortgagees, and the only inference to be drawn from the subsequent transfer to the plaintiff is that the vendor was not a consenting party to the delivery of possession to defendant 10. The plaintiff has already deposited the money due under the mortgage and is entitled to recovery of possession. The result is that the judgment of the Court of appeal below must be set aside and that of the Munsif restored. The plaintiff is entitled to the costs of this appeal.

R.K.

Appeal allowed.

[Case No. 30.]

A. I. R. (33) 1946 Patna 82

VARMA AND PANDE JJ.

Ramkishun Sao and others—Petitioners
v.*Emperor.*

Criminal Revn. No. 526 of 1945, Decided on 7th August 1945, from order of Addl. Sessions Judge, Patna, D/- 14th February 1945.

Evidence Act (1872), S. 145—Previous statements to be admissible under S. 145, need not have been recorded by person having jurisdiction.

Previous statement of a witness reduced to writing can be used in cross-examination under S. 145 but the section does not lay down that the writing which is to be used for the purposes of cross-examination must be by a person having jurisdiction to reduce that statement to writing.

[P 83 C 2]

Therefore, even though the previous statements of a witness recorded by a Special Magistrate under the Special Criminal Courts Ordinance 2 (2) of 1942, must on the declaration of that Ordinance as illegal be taken to have been recorded by a Magistrate who had no jurisdiction to record the same, the statements can still be used under S. 145 for the purpose of cross-examining the witness.

[P 83 C 2]

Jaleshwar Prosad and B. N. Rai —

for Petitioners.

C. P. Sinha for Government-Advocate —

for the Crown.

Varma J. — The petitioners, Ramkishun Sao, Makhri Barhi, Lachmi Narain and

1. ('28) 15 A. I. R. 1928 All. 726 : 50 All. 986 : 118 I. C. 177 (FB), Sohan Lal v. Mohan Lal.

2. ('07) 34 Cal. 207, Sibendrapada Banerjee v. Secretary of State.

Ganauri Sao have been convicted under S. 395, Penal Code, and sentenced to three years' rigorous imprisonment each. The prosecution case is that on 15th August 1942, a large mob attacked the goods shed at Barh station on the E. I. R. and looted away goods worth about Rs. 1000. An information of this incident was sent by the subdivisional officer of Barh to the Government Railway Police at Barh. This information was included in the station-diary, which is Ex. 1 (a). The Sub-Inspector then proceeded to the spot with his junior Sub-Inspector and inspected the condition of the godown. The present petitioners along with a few others were arrested and put on trial before a Special Magistrate; they were convicted by the Special Magistrate on 5th October 1942; but that conviction was set aside by this Court on 21st February 1944. Then a regular trial commenced and after a preliminary inquiry the case was committed to the Court of Sessions. The trial was held by the Assistant Sessions Judge of Patna, with the result already stated. That there was an incident of this nature at Barh railway-station, there can be no doubt. There are a large number of witnesses, the credibility of some of whom cannot in any way be questioned, who speak about the incident. The Sub-Inspector saw the effects of the depredations of the mob; and from the descriptions given one cannot help thinking that the incident took place generally as stated by the prosecution witnesses. The formal first information report was drawn up on 26th August 1942. It has been commented by Mr. Jaleshwar Prosad, appearing on behalf of the petitioners, that this first information report does not contain the name of any of the petitioners before us. Considering the disturbed condition of things in those days and the source through which the information of the occurrence was received at the police-station, it is not surprising that no names of the offenders were given in the information. The real question to be decided in this case is whether the participation of the present petitioners in the occurrence has been proved. In this connexion our attention has been drawn to the procedure followed in the course of the trial. It also appears that there was no test identification held in this case. The procedure complained against can be gathered from the observations of the Assistant Sessions Judge himself. The learned Judge observes as follows :

"It appears that the committing Magistrate allowed some questions to the witnesses in reference

to the statements recorded by the Special Magistrate. The prosecution has attempted to read out some such statements recorded by the committing Magistrate to the assessors while the defence has desired to get the statements recorded by the Special Magistrate here and to put questions to the prosecution witnesses on such statements for the purposes of contradictions. The statements of the accused and those of the witnesses recorded by the Special Magistrate appear to me to be inadmissible statements inasmuch as the Ordinance having been declared to be illegal the Magistrate recording such statements cannot be taken to have any jurisdiction to have recorded them according to law. He recorded the statements not as a private individual so that the statements may be taken even as quasi-judicial statements, but he recorded them as a Magistrate with the result that the statements are inadmissible under S. 24, Evidence Act. Under such circumstances I have disallowed the prayers of the prosecution and the defence in their attempts stated above."

I have quoted in full the observations of the learned Assistant Sessions Judge lest he should take some of my observations as unfair. Previous statements reduced to writing are used in cross-examination under S. 145, Evidence Act, but the section does not lay down that the writing which is to be used for the purposes of cross-examination must be by a person having jurisdiction to reduce the statement to writing. This procedure adopted by the Assistant Sessions Judge has certainly been prejudicial to the accused who wanted to make out either that they were not there, or, if they were there, they were mere sight-seers; that is to say, to establish that they were not guilty. The convictions are, therefore, liable to be set aside on this point alone. There is yet another matter which is noticeable in this case in that the lower appellate Court has not analysed the evidence against each individual accused. It has certainly taken up the witnesses one after another and mentioned the names of the accused identified by each of them and the conditions under which they identified; but that does not give this Court an idea as to what the actual evidence against each individual accused is. We have analysed the evidence against each of the present petitioners and I am sure if the case of the individual accused were considered by the lower appellate Court separately, he would not have upheld the convictions at least of petitioners Ramkishun Sao and Ganauri Sao, because the only person who can be said to have identified these two petitioners is P. W. 5, who happens to be a chaukidar; but this witness denied having identified any of the accused and it was only in the course of cross-examination by the Public Prosecutor that the names of Ramkishun, Ganauri and

other persons were brought out as amongst those said to have been identified by him. Also in the case of Makhri Barhi and Lachhmi Narain their identification is not satisfactory. A number of witnesses did not identify them in the Court of the Assistant Sessions Judge, and it was only by the process of cross-examination that the Public Prosecutor brought out the names of the accused from the statements made by the witnesses before the committing Magistrate.

In view of the fact that the petitioners were prejudiced in their trial by the procedure adopted by the learned Assistant Sessions Judge with regard to the admission in evidence of previous statements, and also owing to the unsatisfactory nature of the evidence against them, I would make the rule absolute, set aside the convictions and sentences and direct that the petitioners be released forthwith.

Pande J.—I agree.

G.N. *Rule made absolute.*

[Case No. 31.]

A. I. R. (33) 1946 Patna 84

VARMA AND DAS JJ.

Sidhu Gope and others — Appellants
v.
Emperor.

Death Reference No. 10 and Criminal Appeals Nos. 183, 184 and 248 of 1945, Decided on 12th June 1945, made by Addl. Sess. Judge, Bhagalpur, D/- 23rd March 1945.

(a) Criminal trial—Evidence—That witnesses are related is no ground for disbelieving them.

The fact that the prosecution witnesses are related to one another or that one of them is interested in the prosecution party is no ground for disbelieving their evidence. [P 88 C 2]

(b) Criminal trial — Evidence — Witness being under police surveillance is no ground for disbelieving him.

The mere fact that a prosecution witness is under police surveillance is not a sufficient ground for disbelieving his testimony when the nature of the surveillance is not known. [P 88 C 2]

(c) Penal Code (1860), S. 97 — A harvesting crops on his field — Protest by B from distance of 50 yards does not amount to invasion of A's property so as to give right of private defence.

Where A is harvesting crops on his field a protest by B from a distance of about 50 yards against the cutting of the crops does not amount to an invasion of the property of A so as to give him the right of private defence of property.

[P 89 C 2]

Penal Code—

('45) Ratanlal, Page 201, N. 2.

('36) Gour, Page 364, N. 855.

(d) Penal Code (1860), S. 149 — Unlawful assembly—Two common objects mentioned in charge—Determination of real and subsidiary object—Test—Common object of assault held not subsidiary to common object of looting.

What is the real common object of an unlawful assembly, and whether of the two common objects mentioned in a charge, one is the real common object and the other is merely subsidiary to it, will depend on the facts of each case and will vary from case to case. No hard and fast rule can be laid down which would fit in with every case : 11 Beng. L. R. 347 (F.B.), *Rel. on.* [P 90 C 2]

Some members of the mob were harvesting the crop while others were standing at a distance armed with dangerous weapons in order to assault anybody who would come to interfere or protest. The members of the mob fell on A and assaulted him as soon as he merely protested against the harvesting of the crop. The members of the mob were charged under S. 149 as constituting an unlawful assembly with two common objects one of looting the crops and the other of assaulting:

Held that it could not be said that the second common object was merely subsidiary to the first common object and that it could not make the members of the mob who shared in that common object an unlawful assembly. The second common object was as important as the first and could make the members of the assembly who shared in that common object an unlawful assembly : ('28) 15 A. I. R. 1928 Pat. 405 and Cr. Appeal No. 711 of 1944, *Disting.* [P 90 C 2]

Penal Code—

('45) Ratanlal, Page 350, Pt. 13.

('36) Gour, Page 518, Pt. 6.

(e) Penal Code (1860), S. 149—Unlawful assembly — All members if necessarily guilty of same offence as principal offender.

The members of an unlawful assembly are not necessarily guilty of the same offence as the principal offender. It has to be determined, with reference to the facts of the case, what offence the members must have known to be likely to be committed; if such offence is a minor offence, then they should be convicted accordingly : ('36) 23 A. I. R. 1936 Pat. 481; Cr. App. No. 31 of 1940 and Cr. App. No. 183 of 1939, *Rel. on.* [P 91 C 1]

But any member of an unlawful assembly is guilty of an offence committed by another member of that assembly, if the offence is of such a nature that the members of the unlawful assembly must have known that such might be committed in prosecution of the common object of the assembly.

[P 91 C 2]

Some members of the unlawful assembly were armed with spears while others were armed with different weapons such as pharsa, lathi, etc. The members attacked A and his party as a result of which A died of injuries inflicted with a spear or bhala:

Held that as the members of the unlawful assembly must have known that grievous hurt with dangerous weapons was likely to be caused in prosecution of the common object of assaulting A and his companions and as it could not be said that the members of the unlawful assembly knew that murder or culpable homicide was likely to be committed, the proper section to apply was S. 326 read with S. 149, Penal Code: Cr. App. No. 183 of 1939, *Rel. on.* [P 91 C 2]

Penal Code—

('45) Ratanlal, Page 348, Pt. 12.

('36) Gour, Page 517, N. 1413; Page 520, N. 1421.

(f) Penal Code (1860), Ss. 149, 302 and 326—Accused charged with murder under first part of S. 149—They can be convicted under second part of S. 149 of minor offence covered by charge even though charge does not mention that accused knew that minor offence was likely to be committed.

Section 149 is divided into two parts: (1) an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly; and (2) an offence such as the members of the assembly knew to be likely to be committed in prosecution of that common object.

[P 92 C 1]

Where the accused are charged of an offence under the first part, e. g., of murder, they can be convicted under the second part of a minor offence, e. g., of grievous hurt, under S. 326 which is covered by the charge even though the charge does not mention that the accused knew that the minor offence (under S. 326) was likely to be committed.

[P 92 C 1]

Penal Code—

(45) Ratanlal, Page 345, N. "Scope"; Page 348, Pts. 11, 13, 14.

(g) Penal Code (1860), S. 149—Word "knew" in—Meaning of—Words and phrases.

The word "knew" in S. 149 indicates a state of mind at the time of the commission of the offence and the subsequent acts, however cruel, cannot affect that knowledge.

[P 91 C 2]

Penal Code—

(45) Ratanlal, Page 348, Pt. 16.

(36) Gour, Page 517, Pt. 5.

(h) Penal Code (1860), S. 302—*B* member of unlawful assembly charged with murder of *A*—At trial evidence given to show that bhala wounds of which *A* died were caused by *B*—No such allegation made in first information report—Accused held entitled to benefit of doubt.

The accused who were members of an unlawful assembly were charged with murder of *A* a member of the other party. There was no doubt that *A* had died of bhala blows inflicted by some members of the unlawful assembly. At the trial evidence was led to show that the accused had inflicted the bhala blows resulting in *A*'s death. In the first information report the names of 13 persons were mentioned and it was stated that they began to attack *A* and his party with lathi, bhala and pharsa. The question was whether in view of the fact that the first information report did not state that the accused inflicted the bhala blows resulting in *A*'s death the accused could be found guilty under S. 302:

Held that the accused could not be found guilty of the offence under S. 302 as they were entitled to benefit of doubt as the first information report did not state that the accused had given the bhala blows.

[P 89 C 1]

Penal Code—

(45) Ratanlal, Page 746, N. "Benefit of doubt."

(36) Gour, Page 1016, N. 3381; N. 3382.

S. N. Sahay, Baldeo Sahai, Ramananda Sinha, S.C. Misra, Ganesh Sharma and T.P. Sinha
— for Appellants.

The Standing Counsel — for the Crown.

Das J. — The nine appellants have been convicted and sentenced by the learned

Additional Sessions Judge of Bhagalpur in the manner stated below. Two of the appellants, Ganu Gope and Sidhu Gope, have been found guilty of the offence of murdering one Mahendra Singh; they have been sentenced to death for this offence which sentence is the subject of a reference under S. 374, Criminal P. C. They have also been found guilty under S. 148, Penal Code, and sentenced to rigorous imprisonment for two years. They have further been found guilty under S. 302 read with S. 149, Penal Code, and sentenced to transportation for life. Ganu Gope has also been found guilty under S. 324, Penal Code, but no separate sentence has been passed against him under that section. Of the remaining appellants, all except two, namely Sipchu Gope and Hublal Singh, have been found guilty under S. 148, Penal Code, and sentenced to two years' rigorous imprisonment; the latter two have been found guilty under S. 147, Penal Code, and sentenced to 18 months' rigorous imprisonment each. These seven appellants have also been found guilty under S. 302 read with S. 149, Penal Code, and sentenced to transportation for life. One of them, namely, Mangal Gope, alias Mangru Gope, has been further convicted under S. 324, Penal Code, but no separate sentence has been passed under that section. It has been directed by the learned Sessions Judge that the sentence of transportation will run concurrently with the substantive sentences of imprisonment passed by him for the offences under Ss. 148 and 147, Penal Code. Therefore, the important sentences are: (1) the sentence of death under S. 302, Penal Code, on Ganu Gope and Sidhu Gope, and (2) the sentence of transportation for life against all the appellants under S. 302 read with S. 149, Penal Code.

The occurrence which resulted in the present case against the appellants took place on 29th March 1944 at about 8 A. M., in a village called Mirachak in Chak Chakhandi Baihar, within the jurisdiction of the mofussil Police-station of Bhagalpur. The place is about 5 miles from the police-station. There are about 50 bighas of bakasht land in the village, comprised in two plots—one plot consisting of about 40 bighas and the other of about 10 bighas. Originally the village belonged to one Premal Pande. He mortgaged this village along with other villages in favour of the father of Babu Bijoy Krishna Banerji (P. W. 17). I may note here that Babu Bijoy Krishna Banerji is a pleader of Bhagalpur. His father brought a suit to enforce the mortgage in 1927. A decree was

obtained and put in execution. During the pendency of the execution proceeding the father died, and Babu Bijoy Krishna Banerji and his elder brother were substituted in place of their father. The mortgaged properties, including the village in question, were sold in execution of the decree and were purchased by Babu Bijoy Krishna Banerji and his brother. Then delivery of possession was obtained in 1931. Babu Bijoy Krishna Banerji stated that after delivery of possession in 1931 he cultivated the bakasht lands, but at the time of harvesting trouble was raised on behalf of Sarda Pande (one of the accused persons acquitted by the learned Sessions Judge) Hublal Singh and others. There were proceedings under S. 144, Criminal P. C., and S. 69, Bihar Tenancy Act. These proceedings were decided against Babu Bijoy Krishna Banerji and his brother. In 1932 Babu Bijoy Krishna Banerji and his brother filed a title suit in respect of the bakasht lands of the village. The title suit was against two sets of defendants, Sarda Pande being one set and Hublal and others being the second set. This suit was decreed in favour of Babu Bijoy Krishna Banerji and his brother. They again obtained delivery of possession in 1935. The prosecution case is that after this delivery of possession in 1935, Babu Bijoy Krishna Banerji gave 40 bighas of land to one Narsingh Singh to cultivate on the batai system, and kept about 10 bighas in khas cultivation. This arrangement continued peacefully till 1943. In September 1943, the Goalas of village Khutaha damaged the arhar crop grown by Narsingh. It may be mentioned here that the Goala accused in this case, such as, Ganu Gope, Sidhu Gope and others, are all residents of village Khutaha. As a result of the trouble created by the Goalas of Khutaha, there were again proceedings under S. 144, Criminal P. C., which were, however, subsequently dropped. The paddy crop of the year 1943-44 was looted away by the Goalas and a proceeding under S. 107, Criminal P. C., was drawn up against the parties. Two of the accused persons had also filed applications under S. 69, Bihar Tenancy Act. It appears that on about 8 or 10 bighas of the land given to Narsingh Singh, the arhar crop was standing. This crop was attached by the Sub-Divisional Officer in connection with the proceeding under S. 69, Ben. Ten. Act. There has been some dispute before us as to whether the attachment subsisted in fact or law on the date the occurrence took place. On the day in question, that is, 29th March 1944,

Narsingh Singh (who is a resident of the neighbouring village of Baijani) learnt from his cowherd Jageshwar Mandal (P. W. 21) that the Goalas of Khutaha were cutting the arhar crop. The deceased Mahendra Singh was a peon of Babu Bijoy Krishna Banerji, appointed only a few months before the present occurrence. Mahendra Singh was a resident of Patna District, and was described by witnesses as a *khalifa* (wrestler). He was staying at the time of the occurrence in the house of Narsingh Singh. On hearing about the harvesting of the crop by the Goalas of Khutaha, Narsingh Singh sent information to Mahendra Singh. Mahendra came with three other persons, Meda Singh, Balik Singh and Jharu Singh. Meda and Balik are brothers of Narsingh. Jharu is their sister's son. Goda Singh another brother of Narsingh Singh, also came there, and these persons, along with two others who joined them on the way, went towards the arhar khet. The arhar khet is across a small rivulet known as Jogia river. The field is across the rivulet towards the east. The prosecution case is that Mahendra Singh and his companion saw about 125 men variously armed: out of these men about 50 or 60 were standing on the eastern bank of the rivulet and the rest were cutting the arhar crop. The distance of the field from the eastern edge of the rivulet would be about 50 yards. From the western side of the rivulet Mahendra Singh inquired of the men standing on the eastern bank of the rivulet as to why they were cutting the arhar crop which had been attached. On this two of the accused persons, Sarda Pande and Hublal Singh, are stated to have given an order for assault. The mob standing on the eastern bank then ran towards Mahendra Singh and his companions. It may be noted that the bed of the rivulet was then dry and there was no difficulty in running across it. It is stated that two of the accused persons, Ganu Gope and Sidhu Gope, pierced their bhalas into the abdomen of Mahendra Singh. The intestines came out and Mahendra Singh fell down. Others of the mob then beat Mahendra Singh with various weapons. Meda and Balik ran to protect Mahendra: they were also assaulted by the members of the mob. The mob, when running towards Mahendra and his companions, also threw brickbats at them. Finding that their life was in danger, Narsingh Singh and his other companions ran away. Narsingh got a tam-tam and accompanied by Meda and Jharu he went to the police-station which he reached at about 10-30 A.M. He gave an informa-

tion at the police-station which is Ex. 1 in the record. The information was given within about 2½ hours of the occurrence. Balik Singh, who also ran away but did not go to the thana, got up on a gular tree. He saw that the mob tied a gamcha round the abdomen of Mahendra and they carried Mahendra towards the east. The Sub-Inspector arrived at the place at about 12-30 P. M. He saw the arhar field and found the cut plants lying on the ground. The body of Mahendra Singh was not found at the place where Mahendra Singh had fallen after the assault on him. There was, however, a trail of blood towards the east. The Sub-Inspector of Police followed up the trail of blood, made certain enquiries and found a dead body in Katoria river, half submerged in water of the depth of about one cubit. This Katoria river is about five to six miles from Jogia rivulet. The dead-body had no head and the body was partly scorched. The right leg was missing and the intestines were protruding from the abdomen. The prosecution case is that this was the dead body of Mahendra Singh which the members of the mob had brought from near the Jogia river. They had severed the head and had tried to burn the dead body. The quick arrival of the Sub-Inspector, however, prevented them from completely burning the dead body. The Sub-Inspector held an inquest over the dead body and sent it to the Civil Surgeon of Bhagalpur for post mortem examination. I shall subsequently refer to this post-mortem examination. The Sub-Inspector searched for the accused persons, but none of them were found in the village. The above is the prosecution story in brief.

The defence of the accused persons is of the following nature. Two of the accused persons, Ganu Gope and Sidhu Gope, who have been sentenced to death, raised the plea of alibi. It is stated that they were at a place called Basukinath in the District of the Santal Parganas from 28th March 1944. Ganu was ill of malaria there, and Sidhu was attending on him. Apart from the plea of alibi, it has also been contended on behalf of these two accused persons that the prosecution case is not true in material particulars; and even if there had been an assault on Mahendra Singh, the circumstances in which that assault was made would give the accused persons a right of private defence. On behalf of the other accused persons it has been contended that the land was settled with them by Babu Bijoy Krishna Banerji on the bhaoli system and was in their pos-

session. Babu Bijoy Krishna Banerji tried to oust them from possession for fear of their getting an occupancy right in the land, and also on account of a dispute over the share of the produce; it is stated that Babu Bijoy Krishna Banerji wanted half share in the produce whereas he was entitled to only 18 seers in the maund. It has been contended on behalf of these accused persons that they did not form an unlawful assembly with the common objects mentioned in the charge; on the contrary, Mahendra Singh and his companions formed an unlawful assembly and wanted to oust the Goalas of Khutaha from possession of the land. It was also contended on behalf of these accused persons that the prosecution case was false in material particulars and that they had been falsely implicated. On behalf of Hublal Singh, whose case was separately argued, the main contention raised is that he was not a member of the mob and has been falsely implicated. I may note that we have been separately addressed on behalf of three sets of appellants—Ganu Gope and Sidhu Gope being one set, Hublal another set and the remaining appellants being the third set. Besides the special pleas raised on behalf of the three sets of appellants, the common defence has been that the prosecution case is false in material particulars and the accused persons have been falsely implicated. We have also been addressed on the individual case of each one of the appellants.

It would be advisable before discussing the evidence in the case to say a few words about the charges under Ss. 147, 148 and 149, Penal Code. Two common objects have been mentioned in the charges under these sections, one being to loot the crops on the land of Narsingh Singh and Bijoy Babu, and the other being to assault Mahendra Singh, Meda Singh and Balik Singh. Some of the arguments raised on behalf of the appellants relate to the common objects mentioned above. I have, therefore, thought it necessary to refer to these common objects at the very outset. The learned Additional Sessions Judge, in agreement with the opinion of the assessors, has found that Narsingh Singh was the *bataidar* in possession in respect of the land in dispute. He has further found that the prosecution case of rioting and assault is substantially true. He has negatived the pleas of *alibi* and the right of private defence. He has then considered the case of each individual accused person and has acquitted those of the accused persons regarding whose presence in the

mob or complicity in the assault there was some doubt.

It would be convenient to take up first the case of the two accused persons, Ganu Gope and Sidhu Gope, who have been sentenced to death. The main points raised on behalf of these two accused persons are (1) the prosecution case is not true in material particulars, (2) the identity of the dead body has not been established, (3) their plea of *alibi* should be accepted, (4) they are protected by the right of private defence and (5) that in any case, they cannot be found guilty under S. 302, Penal Code. I shall take up these points one by one. The prosecution case mainly rests on the testimony of the following witnesses. First of all there are the four brothers, Narsingh Singh (P. W. 1), Meda Singh (P. W. 2), Balik Singh (P. W. 3) and Goda Singh (P. W. 4). Then there is Jharu Singh (P. W. 14), who is the son of their sister. These five witnesses are clearly related to one another. Besides these relations, the independent witnesses are Kuldip Singh (P. W. 7), Naurangi Singh (P. W. 13) and Inder Mandal (P. W. 20). As far as Kuldip Singh (P. W. 7) is concerned, the learned Sessions Judge has not relied on his evidence for a very good reason. It appears that before the investigating police officer the statement of this witness was that he had not seen the occurrence but had heard about it. The witness no doubt denied this in the Court of Session. But, in view of his previous statement, he is clearly an unreliable witness. As to Naurangi Singh (P. W. 13) the comment is that he is a partisan witness. He admits having deposed for Narsingh in a previous cattle grazing case. He also admits that he was an accused along with Narsingh Singh in a case under S. 188, Penal Code. As to Inder Mandal (P. W. 20) the comment is that his name is not mentioned in the first information and that he is also a partisan witness. This witness also admits that he was examined for Bijoy Babu in the grazing case and in the case under S. 107, Criminal P. C. The evidence of this witness is not of any great importance inasmuch as he says that he did not notice the assailants of Mahendra. It further appears from the evidence of the investigating police-officer (P. W. 22) that this witness Inder Mandal had not named Ganu Gope in the mob. Leaving aside Inder Mandal and Kuldip Singh, we are left with the evidence of the four brothers, their sister's son and Naurangi Singh (P. W. 13). It must, I think, be conceded that the pro-

secution witnesses are related to one another, and Naurangi Singh (P. W. 13) had previously deposed for Narsingh in the grazing case and was an accused with Narsingh in a case under S. 188, Penal Code. The question is whether the evidence of these witnesses should be discarded on this ground. I am unable to agree with the contention that the evidence of these witnesses should be disbelieved on the ground that they are related to one another, or on the ground that Naurangi Singh is interested in the prosecution party. Babu Bijoy Krishna Banerji is a resident of Bhagalpur, who had purchased the village in execution of his decree. Since his purchase a great deal of trouble has been raised on behalf of different persons claiming the lands to have been settled on the *nagdi* or *batai* system by the previous landlord. One of such persons was Sarda Pande, a resident of village Baijani, another was Hublal Singh, another resident of village Baijani. Sarda Pande is related to the previous landlord and obviously has some influence in the village. The *Goalas* of Khutaha now claim the lands to be their *batai* lands. In such circumstances, paucity of evidence from independent sources is not a sufficient ground for disbelieving the testimony of the four brothers, their sister's son and Naurangi Singh.

The evidence of Narsingh Singh has been seriously criticised before us on the ground that he pleads ignorance of the proceeding under S. 107, Criminal P. C. It is true that Narsingh Singh has falsely pleaded ignorance of such a proceeding. Our attention has also been drawn to the fact that the investigating police-officer (P. W. 22) has admitted that Narsingh and one of his brothers are under police surveillance, though Narsingh denies that he is under such surveillance. The nature of the surveillance is, however, not known, and the mere fact that Narsingh is under police surveillance is no sufficient ground for disbelieving his testimony. There are two important particulars in respect of which the story given by the aforesaid prosecution witnesses is somewhat different from the story as set out in the first information. The prosecution witnesses have said that two of the accused persons, Sarda Pande and Hublal Singh gave the order for the assault. This part of the story is not mentioned in the first information. Sarda Pande has already been acquitted by the learned Sessions Judge, and the omission of this part of the story in the first information, so far as it affects Hublal,

will be considered when I take up the case of Hublal Singh. The other important point on which there is a difference between the first information and the story set out in Court is about the two accused persons, Ganu Gope and Sidhu Gope. These two accused persons are stated to have run straight on Mahendra and pierced their *bhalas* in the abdomen of Mahendra. The first information does not, however, present the story in exactly the same way. In the first information the names of 13 accused persons are mentioned, including Sidhu Gope and Ganu Gope, and then it is stated that they began to strike with *lathi*, *bhala* and *pharsa*. The first information does not state that Ganu and Sidhu ran straight on Mahendra and pierced their *bhalas* into the abdomen of Mahendra. I think the benefit of this omission should go to the two accused persons Sidhu Gope and Ganu Gope. This will affect the charge under S. 302, Penal Code and I shall presently discuss this aspect of the matter.

The question now is if the difference in the story as set out in the first information and the story as given in Court would lead one to reject the entire prosecution case as false. In my opinion, the answer to this question must be in the negative. The first information appears to be a general statement of what happened. Substantially, the occurrence as given in the first information is the same as testified to by the witnesses examined on behalf of the prosecution. The difference in particulars is not such as to lead one to the conclusion that the prosecution has given an entirely false version of the occurrence. The prosecution witnesses have all stated that there was a mob of about 100-125 persons, some of whom were harvesting the crop and some were standing on the eastern bank of the Jogia river. They were all variously armed with dangerous weapons. As soon as Mahendra and his companions came near the Jogia river and Mahendra protested against the harvesting of the crop, the members of the mob on the bank of the river ran towards Mahendra and his companions and an attack was made on Mahendra. Meda and Balik, who tried to help Mahendra, were also assaulted. Substantially, this is the prosecution case as set out in the first information and as testified to by the witnesses examined in Court. No such serious discrepancies have been pointed out as would lead one to think that the prosecution case was not substantially true.

Coming now to the question of the right of private defence, one of the points for con-

sideration is the possession of the land in dispute. There has been a good deal of oral evidence on this point, and the evidence of Babu Bijoy Krishna Banerji (P. W. 17) has been seriously criticised before us. It is admitted by both parties that Babu Bijoy Krishna Banerji is entitled to receive the rent for the land in dispute. The main dispute is as to who the *bataidar* is. Narsingh Singh claims to be the *bataidar*, who is supported by Babu Bijoy Krishna Banerji. The *Goalas* of Khutaha, on the contrary, contend that they are the *bataidars* whom Babu Bijoy Krishna Banerji wishes to oust. In the view which I have taken of the occurrence in this case, it is unnecessary to decide the question of possession. There can be no doubt that Mahendra was assaulted before he had even crossed the Jogia river. The place where Mahendra was assaulted as testified to by the witnesses would appear from the sketch map (Ex. 3) prepared by the Sub-Inspector of Police. The evidence is that the *arhar* field on which the crop was being harvested was at a distance of 50 yards from the eastern bank of the river. Mahendra was still on the western bank when he protested against the cutting of the *arhar* crop. Such a protest did not amount to an invasion of the property of the accused persons, even if it is assumed that the *Goalas* of Khutaha were in possession of the land in dispute. Neither, in my opinion, is there right of private defence of body in the circumstances in which the assault was made on Mahendra Singh. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues. No such circumstances have been clearly established as would lead us to think that there was any apprehension of danger to the body, not to speak of grievous hurt, to the accused persons or the members on their side, so as to give rise to a right of private defence to them.

Learned counsel for the appellants had drawn our attention to the following circumstances: Mahendra Singh was a *khalifa* (wrestler) brought from the Patna District; Narsingh and one of his brothers were under police surveillance; the evidence of Meda Singh (P. W. 2) shows that he had a *lathi* and others of his party had *dantas*; the statement of Jharu Singh to the Sub-Inspector of Police was to the effect that

Mahendra asked his companions to go forward and not to run away. On these circumstances it has been contended before us that Mahendra and his companions came prepared to commit an attack, and, therefore, the accused persons had the right of private defence. I have given my best consideration to the circumstances mentioned above, which have been brought out in the cross-examination of some of the prosecution witnesses. I am unable to accept the contention that those circumstances show that Mahendra Singh was about to make an attack on the accused persons so as to give them a right of private defence of body. (After considering the evidence his Lordship concluded.) From whatever point of view we look at the case, it appears to me that the accused persons are not protected by the right of private defence, either of property or of body. [His Lordship then held that the dead body found was identified and rejected the plea of *alibi* set up by Ganu Gope and Sidhu Gope.] Now, comes the question as to whether the two accused persons, Ganu Gope and Sidhu Gope, have been rightly convicted under S. 302, Penal Code. I have already referred to the fact that these two accused persons are entitled to the benefit of the omission in the first information, which does not single out these two accused persons as having given the *bhala* blows on the abdomen of Mahendra Singh. There can be no doubt that some members of the mob did give *bhala* blows on the abdomen of Mahendra Singh. There can also be no doubt that those members of the mob who gave the two *bhala* blows on the abdomen of Mahendra Singh would be guilty of the offence of murder under S. 302, Penal Code. The question, however, is, if these two accused persons, Sidhu Gope and Ganu Gope, can be found guilty of the offence under S. 302, Penal Code, in view of the fact that the first information report does not state that they had given the two *bhala* blows on the abdomen of Mahendra Singh. In my opinion, these two accused persons cannot be found guilty of the offence under S. 302, Penal Code, in view of the statement made in the first information.

The next question is if these two and the other accused persons can be found guilty under S. 302 read with S. 149, Penal Code. There is no doubt in my mind that Mahendra Singh was assaulted by the members of the mob in prosecution of the common object of the unlawful assembly. Mr. Baldeo Sahai, arguing for some of the appellants, has con-

tended before us¹ that if the *Goalas* of Khutaha were in possession of the disputed land and the crop was not under attachment, then one of the common objects mentioned in the charge, namely, to loot the crops of Narsingh Singh, would undoubtedly fail. He contends that the accused persons were committing no offence in cutting their own crops. I have already said that it is unnecessary to determine in this case which *bataidar* was in possession of the land in dispute. Even if the *Goalas* of Khutaha were in possession of the land, they would still be an unlawful assembly when they attacked Mahendra Singh on the other side of the river merely on his protest that the crops should not be cut. The charge mentions two common objects as stated by me previously. The contention of Mr. Baldeo Sahai is that the second common object of assaulting Mahendra Singh was merely ancillary to the first common object; and if the first common object fails, the accused persons cannot be found guilty on the second common object. For this he has relied on the case in A.I.R. 1928 Pat. 405¹ and the unreported case in Criminal Appeal No. 711 of 1944.² What is the real common object of an unlawful assembly, and whether of the two common objects mentioned in a charge, one is the real common object and the other is merely subsidiary to it, will depend on the facts of each case and will vary from case to case. No hard and fast rule can be laid down which would fit in with every case. In the particular case before us, some members of the mob were harvesting the crop, others were standing on the bank of the river armed with dangerous weapons in order to assault anybody who would come to interfere or protest. I have found that the members of this mob fell on Mahendra Singh and assaulted him on the other side of the river as soon as he merely protested against the harvesting of the crop. In these circumstances, it cannot be said that the second common object is merely subsidiary to the first common object, and that it cannot make the members of the mob, who shared in that common object, an unlawful assembly. In my opinion, the second common object is as important as the first one, and can make the members of the assembly, who shared in that common object, an unlawful assembly. This matter has been

1. ('28) 15 A. I. R. 1928 Pat. 405: 108 I. C. 421, *Aklu Mian v. Emperor*.

2. Cri. Appeal No. 711 of 1944, decided on 2nd February 1945, *Baldeo Gangota v. Emperor*.

very clearly explained by Ainslie J., in the leading case in 20 W. R. Cr. 5.³ Though Ainslie J., delivered the dissentient judgment in the Full Bench case, the point which is under consideration was one of the points on which their Lordships were in agreement. I can do no better than quote from the judgment of Ainslie J.:

"I do not think it possible on the evidence to say that the common object was limited to the ejection, and that the use of force was not deliberately contemplated. Nor do I think that we may say that force was only a means to an end, and that the ultimate object of obtaining possession of the field was the only common object of the party. It was clearly the deliberate intention of the unlawful assembly to use certain means to obtain a certain end, and I am therefore unable to come to any other conclusion than that the common object was compounded both of the use of the means and the attainment of the end."

In this case also, the common object of assaulting anybody who would come to intervene was present in the minds of the members of the mob from the very beginning; otherwise, some members of the mob would not be standing on the river armed with dangerous weapons. It cannot, therefore, be said that the common object of assaulting Mahendra Singh and others was a subsidiary common object of no particular account; on the contrary, it was as important as the other common object of harvesting the crop. The two cases on which Mr. Baldeo Sahai has relied can easily be distinguished on facts. In A. I. R. 1928 Pat. 405¹ the real common object was to destroy the hut; the beating was merely an incidental happening. In Appeal No. 711 of 1944,² the finding is that two of the accused persons were assaulted first which resulted in an exchange of blows by those who had accompanied these two accused persons. Naturally, therefore, assault was not taken as the principal common object of the unlawful assembly. It is now well settled, as far as this Court is concerned, that the members of an unlawful assembly are not necessarily guilty of the same offence as the principal offender. It has to be determined, with reference to the facts of the case, what offence the members must have known to be likely to be committed: if such offence is a minor offence, then they should be convicted accordingly: 17 P. L. T. 350.⁴ There are two other decisions also in which the same principles have been followed (Criminal Appeal No. 31

of 1940⁵ and Criminal Appeal No. 183 of 1939).⁶ In both these cases it has been held that a person can be convicted of the constructive offence of murder not only where the offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, but also where the offence is such as the members of that assembly know to be likely to be committed in prosecution of the common object. In short, any member of an unlawful assembly is guilty of an offence committed by another member of that assembly, if the offence is of such a nature that the members of the unlawful assembly must have known that such might be committed in prosecution of the common object of the assembly. The following observations made by Meredith J., in Criminal Appeal No. 183 of 1939⁶ are relevant for the purposes:

"In such cases, some member of the mob, carried away by anger and excitement, frequently goes further than is likely to have been anticipated. In the circumstances, it is neither necessary nor right, in my opinion, to hold all the appellants guilty of murder. When they joined in this attack, however, a number of them being armed with spears, they must have known it likely that grievous hurt would be caused with deadly weapons to some one, that is to say, they must have known it likely that the offence under S. 326 would be committed."

I agree with the observations made above, and, in my opinion, those observations apply with equal force in the present case. Some of the members of the mob which attacked Mahendra Singh were armed with spears; others were armed with different weapons, such as, *farsa*, *lathi*, etc. The members of the unlawful assembly must have known that grievous hurt with dangerous weapons was likely to be caused in prosecution of the common object of assaulting Mahendra Singh and his companions. I do not think it can be said that the members of the unlawful assembly knew that murder or culpable homicide was likely to be committed. I, therefore, think that the proper section to apply in the present case is S. 326 read with S. 149, Penal Code. I should also add that the word "knew" in S. 149, indicates a state of mind at the time of the commission of the offence, the subsequent dragging of the body etc., however cruel, cannot affect that knowledge.

Mr. Baldeo Sahai, appearing for some of the appellants, has also contended that the charge is defective inasmuch as it says that

3. (73) 11 Beng. L. R. 347 : 20 W. R. Cr. 5 (FB), Queen v. Sabid Ali.

4. (36) 23 A. I. R. 1936 Pat. 481 : 162 I. C. 563 : 17 P. L. T. 350, Bhagwat Singh v. Emperor.

5. Cri. Appeal No. 31 of 1940, decided on 24th April 1940, Tulakant Jha v. Emperor.

6. Cri. Appeal No. 183 of 1939, decided on 6th November 1939, Rama Shankar v. Emperor.

the offence of murder was committed in prosecution of the common object of the unlawful assembly. It is well known that S. 149, Penal Code, is divided into two parts: (1) an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly; and (2) an offence such as the members of the assembly knew to be likely to be committed in prosecution of that common object. It has been contended by Mr. Baldeo Sahai that the charge is under the first part and, therefore, the appellants cannot be convicted of an offence under the second part. In my opinion, this contention is not worthy of acceptance. The charge no doubt mentions that the offence of murder was committed in prosecution of the common object of the unlawful assembly. The offence under S. 326 read with S. 149, Penal Code, is a minor offence and is covered by the charge. The mere fact that a charge does not mention that the members of the unlawful assembly knew that an offence under S. 326 was likely to be committed, does not invalidate the charge, nor has it caused any prejudice to the appellants.

I will now take up the individual case of each one of the appellants. As far as Hublal Singh is concerned, he is clearly entitled to the benefit of doubt. It was alleged against him that he had given the order for assault. This fact is not mentioned in the first information. Hublal Singh was one of the defendants in the title suit which Babu Bijoy Krishna Banerji brought in 1932. There was, therefore, a temptation to make him an accused person in the present case as well. Naurangi Singh (P. W. 13) has stated that he knows Hublal Singh; but he did not notice him in the mob. He has no doubt been identified by other witnesses. In view, however, of the circumstances mentioned above, Hublal Singh is entitled to the benefit of doubt. As to Ganu Gope and Sidhu Gope, they have been identified by a large number of witnesses. Their names appear in the first information report. The evidence of Meda Singh (P. W. 2) shows that Ganu Gope and three others hit him with *bhala*. The doctor's evidence shows that Meda Singh had only one *bhala* injury. It is doubtful which of the accused caused the *bhala* injury on Meda Singh. The conviction under S. 324, Penal Code, cannot therefore be supported. There can, however, be no doubt of the complicity of these two accused persons in the assault on Mahendra Singh.

As to the remaining six accused persons,

Iswar Gope is named in the first information and is identified by P. Ws. 1, 4, 13, 14 and 20. Even excluding Inder Mandal (P. W. 20), he is identified by four witnesses. The evidence is also clear that he was armed with a *bhala*. Mangal Gope, *alias* Mangru Gope, has been named in the first information and has been identified by P. Ws. 1, 2, 3, 4, 13, 14 and 20. Even excluding the witnesses about whose testimony there may be some doubt, he has been identified sufficiently by a large number of witnesses. The evidence is also clear that he was armed with a *bhala*. He has also been found guilty under S. 324, Penal Code for having hit Meda Singh with a *bhala*. For the reasons given in the case of Ganu Gope, the conviction under S. 324, Penal Code, against this accused person cannot be sustained. Accused Sipchu Gope has been named in the first information and has been identified by a large number of witnesses. He was not, however, armed with a dangerous weapon. Hirangi Gope is named in the first information and has been identified by a large number of witnesses. He was armed with a *pharsa*. Banru Gope is named in the first information and is identified by four witnesses. He was armed with a *bhala*. Bhola Gope (son of Ganu Gope) is named in the first information and is identified by five witnesses. Two of the witnesses, however, did not name him before the police. Excluding these two witnesses, there are only three witnesses, P. Ws. 1, 4 and 13, who identify him. In a large mob identification is not always easy, and, I think, this accused, who is identified by the least number of witnesses, should also be given the benefit of doubt.

The result, therefore, is as follows. Appellants Hublal Singh and Bhola Gope are entitled to the benefit of doubt and should be acquitted. Their appeals are allowed and the conviction and sentences passed against them are set aside. The remaining appellants are all found guilty under S. 326 read with S. 149, Penal Code. Those of them who were armed with deadly weapons, namely, Ganu Gope, Sidhu Gope, Iswar Gope, Mangal *alias* Mangru Gope, Hirangi Gope and Banru Gope, are also found guilty under S. 148, Penal Code. The remaining appellant, Sipchu Gope, who was not armed with a deadly weapon, is found guilty under S. 147, Penal Code. The conviction under S. 324, Penal Code against Ganu Gope and Mangal Gope is set aside. Six of the appellants, namely, Ganu Gope, Sidhu Gope, Iswar Gope, Mangal *alias* Mangru Gope, Hirangi Gope and Banru

Gope are sentenced to rigorous imprisonment for seven years under S. 326 read with S. 149, Penal Code. Sipchu Gope, who was not armed with a deadly weapon, is sentenced to rigorous imprisonment for four years under S. 326 read with S. 149, Penal Code. It is not necessary to pass any separate sentence under ss. 148 and 147, Penal Code.

The net result, therefore, is that the appeals of Hublal Singh and Bhola Gope are allowed and the appeals of the other seven appellants are dismissed with the modifications of the conviction and the sentences mentioned above. The reference under S. 374, Criminal P. C., is discharged.

Before I conclude, I would like to observe that this case shows that if the Sub-divisional Officer had taken timely steps to get the crops cut, after the attachment under S. 69, Ben. Ten. Act, the occurrence might have been avoided. The order sheet (Ex. 11), to which I have made a reference, shows that the learned Sub-divisional Officer had ordered the cutting of the crops after attachment. If timely steps had been taken to give effect to the order, the unfortunate result which followed would have been avoided. The necessity of prompt action in cases of this nature, where there is an apprehension of a breach of the peace, cannot be over-emphasised. This is a case in which the parties have been fighting over possession for a long time; and whenever there is an apprehension of a breach of the peace, the Magistrate should take prompt action and decide the dispute once for all under S. 145 or any other appropriate section of the Criminal Procedure Code.

Varma J. — I agree.

G.N. *Order accordingly.*

[Case No. 32.]

A. I. R. (33) 1946 Patna 93

FAZL ALI C. J. AND PANDE J.

Deonandan Prasad Singh and others
—Appellants

v.

Pardip Singh and others—Respondents.

Civil Appeals Nos. 608, 626, 628, 641, 642, 645, 646 and 647 of 1943, Decided on 16th May 1945, from appellate decrees of Sub-Judge, Patna, D/- 23rd February 1943.

(a) Landlord and tenant — Raiyat holding land at fixed rate of rent — Raiyat can claim remission of rent on ground of landlord's neglect to maintain irrigation arrangements if there be such term in contract of tenancy — Kabuliyat read with record of right held clearly implied such term.

Ordinarily when rents are fixed in perpetuity no remission can be allowed. But a raiyat holding land at a fixed rate of rent can claim remission of rent on the ground of the landlord's failure to maintain the irrigation arrangements in proper order if the contract creating the tenancy embodies a term to that effect. The Court can grant such relief in the matter of remission as appears to it fair and reasonable in the circumstances of the case: S. A. No. 488 of 1941, *Expl. and Rel. on*; ('36) 23 A. I. R. 1936 Pat. 341, *Expl.* [P 94 C 2; P 95 C 1; P 96 C 2]

The irrigation record of rights (*Fard Abpashi*) of a mouza recorded a custom that the tenants holding lands in the mouza were liable to pay rent on maintenance of complete irrigation arrangements by the landlord. Under the kabuliyat the tenants were to hold lands at rate of rent fixed in perpetuity and were to pay rent, according to instalments, as fixed, year by year, without raising any objection as to inundation, drought and destruction caused by worms and hail-storms, earthly and heavenly calamities. The kabuliyat also provided that the tenants shall carry out orders for the supply of village labour for *pain* and embankments to the landlord and in default shall be responsible therefor and shall be liable to pay costs. Expenses relating to earth work and *gilandazi* were and were to remain the concern of the landlord:

Held that the stipulations in the latter part of the kabuliyat definitely controlled the stipulations in the earlier part of the document. If it were the intention of the parties that the defendants were to pay the rent fixed without any objection of the nature as stated in the early part of the document, then it was quite unnecessary to provide in the deed regarding the landlord's obligation to maintain the irrigation arrangements and the tenant's liability to supply labour for the repair of *pains* and *bandhs*. Therefore, the intentions of the parties were quite manifest that the payment of rent, without any objection of the nature as provided in the early part of the deed, was subject to the maintenance of irrigation arrangements by the landlord for the benefit of the entire tenantry of the mouza irrespective of any distinction as to the term of the rent. Therefore the tenants holding land at fixed rate of rent were entitled to claim remission on ground of landlord's failure to maintain the irrigation arrangements in proper order. [P 96 C 2]

(b) Deed — Construction — Instrument of agreement — Principles of construction indicated.

A document, e. g. an instrument of agreement, must be construed as a whole and every word used must receive due weight according to its plain common meaning. Seemingly inconsistent terms in the instrument of agreement should be interpreted to bear a reasonable meaning of the transaction as a whole consistent with common sense and ordinary conduct of human affairs. [P 96 C 1, 2]

T. P. Act —

('45) Chitaley, S. 8, N. 20, Pts. 9, 11, 13.

(c) Landlord and tenant — Kabuliyat relating to lands in mouza — Custom obtaining in mouza as to right of tenantry applies in absence of express stipulation to the contrary.

If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference, a promise for the benefit of the other party

in conformity with such usage or custom; provided there be no express stipulation between them which is inconsistent with such usage. To be binding, however, such usage must be uniform and universal, but when such invariable usage is proved, it is to be considered as the basis of the contract between the parties, and their respective rights and liabilities are held to be precisely the same as if, without any usage, they had entered into a special agreement to the like effect. [P 95 C 2; P 96 C 1]

Therefore where the irrigation record of rights (*Fard Abpashi*) of a mouza recorded a custom that the tenants holding lands in the mouza were liable to pay rent on the complete maintenance of the irrigation arrangements by the landlord, a *kabuli-yat* creating a tenancy even though at a fixed rate of rent in respect of lands in the mouza must in the absence of an express stipulation to the contrary, be taken to be subject to the custom as recorded in the *Fard Abpashi*. [P 96 C 1]

(d) Landlord and tenant—Rent suit—Tenant claiming remission on ground of landlord's neglect to maintain irrigation arrangements — Proof of neglect — Duty of Court (Per *Fazl Ali C. J.*).

It is very easy for the tenants in a rent suit by the landlord to assert that they are not liable to pay the full rent because the landlord has shown neglect in maintaining the irrigation arrangements in proper order. But the Courts should not accept such allegations specially when they are of a vague and general character in the absence of clear and cogent evidence as to the landlord's failure to discharge his obligation in regard to irrigation. In such a case the Courts should try to find whether the arrangements are reasonably adequate or whether the landlords have been so remiss in their duty that the productivity of the tenants' land in the years in suit has been materially affected.

[P 97 C 2]

L. K. Jha — for Appellants.

Raj Kishore Prasad — for Respondents.

Pande J. — These appeals are from appellate decrees dated 23rd February 1943, of the Subordinate Judge, first Court, Patna, which modified the decrees dated 13th March 1942, of the Munsif of Barh, in suits for recovery of arrear rents of agricultural holdings. The suit holdings are within mouza Dhouria Badal Singh, touzi No. 9095 of which the plaintiffs are proprietors of 14 annas 12½ dams share having separate collections from the pro forma defendants who are proprietors of the remaining share. The defendants are raiyats of the holdings at rate of rent fixed in perpetuity. The period of claim for arrear rent varies in different suits, it being 1345 to 1348, or 1346 to 1348. The defendants contend that the landlords neglected to maintain the irrigation arrangements of the mouza in proper order and this had affected the produce of the holdings in question in the years in suit. They pleaded for abatement of rent by 50 per cent. on that ground. The original Court found that the irrigation arrangements were

in good order and it has not been proved that there was any appreciable deficiency in the productive capacity of the lands on account of any neglect of *gilandazi*. On this finding and also for the reason that the rents of the holding being fixed in perpetuity that Court held that the defendants are not entitled to any remission of rent on the ground alleged. Accordingly the Munsif granted decrees to the plaintiffs according to their claim. The learned Subordinate Judge who heard the appeals found that *gilandazi* work was not fully done during the years in suit and payment of rent was subject to the condition of maintenance of the irrigation arrangements in proper order. He held that the defendants were entitled to an abatement of rent by 25 per cent. for the years in suit. The plaintiffs have preferred these appeals.

The finding of the appellate Court on the point of maintenance of irrigation arrangements in proper order is challenged on behalf of the appellants. It appears that a commissioner was appointed to inspect the irrigation arrangements of the mouza. The commissioner was required by the writ to inspect eight plots. He however inspected four of them only. Of these four he found one Alang in a dilapidated and neglected condition for some years and minor breaches in the other three. The plaintiff's *Patwari* stated that irrigation arrangements have been in the same condition for the last 20 years, while the defendants' witnesses stated that it has been so for the last 10 or 15 years. These materials seemed to the Subordinate Judge to justify the finding arrived at by him which being a finding of fact cannot be re-opened in second appeal. The principal question for determination in these appeals is whether the defendants holding the lands in suit at a rate, or rate of rent fixed in perpetuity are entitled to any remission of rent on account of the landlord's failure to maintain the irrigation arrangements in proper order. It has been urged for the appellants that the rent of the holdings being fixed in perpetuity remission of rent, in the absence of any term to such effect in the contract which created the tenancies is not permissible in law, and that cl. (c) of S. 112A (1), Ben. Ten. Act, which provides for remission of rent in such circumstance applies only to occupancy holdings and, therefore, the defendants cannot claim benefit of the said provision. In support of this contention reference is made to the decision of a Special Bench of this Court

in 15 Pat. 594.¹ In that case it was held that :

"Where the rights and the liabilities of the parties are regulated by contract, the terms of which could not be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship, which might have been provided against in the contract but which the parties have omitted to provide for. Therefore, there is no justification for extending the principles underlying S. 38, Ben. Ten. Act, 1885, to a tenant holding under Istemrari mokarrari lease."

The learned Subordinate Judge in allowing partial remission of rent for the years in suit appears to have followed the decision of a Division Bench of this Court in *Sir Ganesh Dutta Singh v. Somar Mahto* in Second Appeal No. 488 of 1941. The learned advocate for the appellants submitted that the decision of the Division Bench is in conflict with the decision of the Special Bench which ought to prevail. That case was also for recovery of arrear of rent by these very appellants against certain tenants of the same mouza. The rent of the holdings in the suits giving rise to those appeals was also fixed in perpetuity. The learned Subordinate Judge who heard those appeals construed the terms embodied in the kabuliyat with reference to the irrigation record of rights (*Fard Abpashi*) and came to the conclusion that there was an implied term in the contract of the tenancy of those tenants that the realisation of rent is subject to the maintenance of the irrigation works by the landlord and as that had not been done, the tenants were held entitled to abatement of rent. Their Lordships of the Division Bench accepting the finding of the Court below held the tenants entitled to the remission of rent as granted by the Subordinate Judge. It is clear that in that case remission was allowed on the ground that it was permissible under the terms of the contract which created the tenancy. Therefore, the decision of the Division Bench does not seem to me to be in any way at variance with the principle of law enunciated by the Special Bench in the case referred to above.

In the present appeals the learned Subordinate Judge was of the opinion that the terms of the kabuliyat read with the *Fard Abpashi* clearly implied that the payment of rent was subject to the condition of maintenance of the irrigation arrangements in proper order by the landlord. Mr. Lakshmi Kant Jha disputes the correctness of

the view of the terms of contract formed by the learned Subordinate Judge. Therefore, the terms of the contract as embodied in the kabuliyat executed by the defendants seem to require examination. Now it appears that in six out of the eight appeals the kabuliyats were executed in the year 1909 and in two of them in the year 1923. The kabuliyats of 1909 recite that owing to frequent differences about the rate of rent the parties agreed to settle the rent of the holdings at Rs. 8 per bigha in perpetuity. The recital itself shows that the kabuliyats did not create any new tenancy but merely fixed the rent of the holdings that were already in possession of the raiyats on certain term of rate. The evidence is that those tenants held their respective holdings as Bhaoli. The learned advocate for the appellants also admitted it to be so. Therefore, the kabuliyats merely commuted the bhaoli rent to nakdi rent fixed in perpetuity. In other two cases fresh bakasht lands of the malik were settled by the kabuliyat on payment of nazrana at rents fixed in perpetuity specified in the kabuliyats. The irrigation record of rights of the mouza which was published in the year 1919 provides that in case of complete arrangement of irrigation the tenant will be liable to pay the existing rent. This document further shows that there is no natural source of supply of water to the mouza. The irrigation of lands depends on *khata*s and *ahras* constructed and maintained by the maliks. The *Fard Abpashi* shows that there are elaborate irrigation arrangements for the mouza. It is, therefore, clear that the maintenance of *ahras* and *khata*s as also other minor arrangements of irrigation is absolutely necessary for proper cultivation of lands of the mouza. The learned Subordinate Judge was of the view that the statement in the *Fard Abpashi* that on maintenance of complete irrigation arrangements the tenants are liable to pay rent, recorded a customary right of tenants holding lands in that mouza. I am inclined to agree with this view. The terms embodied in the kabuliyat may, therefore, be reasonably construed with reference to the recognised custom of tenancy in the mouza. The principle of law is :

"If there be an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference, a promise for the benefit of the other party in conformity with such usage or custom; provided there be no express stipulation between them

1. (36) 23 A. I. R. 1936 Pat. 341 : 15 Pat. 594 : 163 I. C. 1003 (S.B.), *Dukha Lal Chaudhry v. Mt. Manabati*.

which is inconsistent with such usage. To be binding, however, such usage must be uniform and universal, but when such invariable usage is proved, it is to be considered as the basis of the contract between the parties, and their respective rights and liabilities are held to be precisely the same as if, without any usage, they had entered into a special agreement to the like effect." (Chitty's Treatise on the Law of Contracts, 9th Edn., 1937, page 46).

Here the said custom of tenancy in the mouza is clearly established by the entry in the survey record of rights. There is no evidence to the effect that the custom applies to a particular class of tenancy and not to the tenancy in the mouza as a whole. Therefore, the terms of the contract between the parties as embodied in the kabuliyat must be construed on the basis of that well-established custom. In that view of the matter, it cannot reasonably be contended that tenants holding lands at rents fixed in perpetuity are not entitled to the benefit of the customary right of tenants holding lands in the mouza. There is, however, a term in the kabuliyat that the tenant shall pay rent according to instalments, as fixed, year by year, without raising any objection as to inundation, drought and destruction caused by worms and hail-storms, earthly and heavenly calamities. It may be argued that this express stipulation is inconsistent with the customary rights as recorded in the *Fard Abpashi*, and, therefore, the defendants must be taken to have contracted themselves out of the said right. But each of the kabuliyats whether of 1909 or of 1923 also contains the following terms :

"*Wo hukum gowam pain bandh ka malikan ko dia karenge basurat khelaf uske jawab-dehi wo kharcha taaluk manmokir ke hai wo hoga . . . wo kharcha mitti wo gilandazi wo ghaira taaluk ahle mashan ka hai wo hoga.*" (And I shall carry out orders for the supply of village labour for pain and embankments to the maliks, in default I shall be responsible therefor and shall be liable to pay costs. Expenses relating to earth work and gilandazi are and shall remain the concern of the proprietors)."

The principle of law is:

"Where words of recital or reference manifest a clear intention that the parties should do certain acts, the Courts will from these infer an agreement by them to do such acts" (Chitty's Book referred above, page 48).

The terms just quoted give clear indication of the intention of the parties that the landlord shall maintain the irrigation arrangements in proper order. The aforesaid two stipulations in the *kabuliyat* must be considered together in order to determine the intentions of the contracting parties. It is a well-established principle that the document must be construed as a whole and every

word used must receive due weight according to its plain common meaning. Seemingly inconsistent terms in an instrument of agreement should be interpreted to bear a reasonable meaning of the transaction as a whole consistent with common sense and ordinary conduct of human affairs. In my opinion the stipulations in the later part of the instrument definitely control the stipulations in the earlier part of the document, as stated above. If it were the intention of the parties that the defendants were to pay the rent fixed without any objection of the nature as stated in the early part of the document, then it was quite unnecessary to provide in the deed regarding the landlord's obligation to maintain the irrigation arrangements and the defendants' liability to supply labour for the repair of *pains* and *bandhs*. For these reasons the intentions of the parties appear to me to be quite manifest that the payment of rent, without any objection of the nature as provided in the early part of the deed was subject to the maintenance of irrigation arrangements by the landlord for the benefit of the entire tenantry of the mouza irrespective of any distinction as to the term of the rent. It has been found above that the landlord neglected the *gilandazi* in the years in suit. The lower Court has accepted the defendants' evidence to the effect that the produce of the lands was affected in consequence of the said failure on the part of the landlord. The landlord having failed to act up to the terms of the contract, the tenants are entitled to such relief in regard to payment of rent as may be deemed suitable and just by the Court in the circumstances of the case. The appellate Court granted remission of rent by 25 per cent. for the years in suit. The estimate of the relief granted by the Court below seems fair and reasonable in the circumstances of the case.

Mr. Raj Kishore Prasad advocate for the respondents, submitted that the defendants are entitled to remission of rent also under cl. (c) of S. 112A (1) as they are occupancy tenants of the holdings in question although the rents are fixed in perpetuity. His argument is that in six cases relating to the kabuliyats of the year 1909 the tenants were already occupancy raiyats of the holdings at bhaoli rent and the kabuliyats merely commuted the bhaoli rent to nakdi rent in perpetuity. Therefore, mere commutation of rent, though at a rate fixed in perpetuity, cannot operate to deprive those tenants of their occupancy rights in the holdings which existed at the time of the execution of the

kabuliyats. As to the other two cases of new settlement by the kabuliyats of 1923 he submitted that the tenants were settled raiyats of the mouza at the time and, therefore, by the operation of S. 21, Bengal Tenancy Act, they became occupancy raiyats of the lands newly settled with them. In support of this contention the learned advocate relied upon the following cases : 27 C. L. J. 284,² 49 Cal. 280³ and 56 Cal. 173.⁴

These cases related to the question whether a raiyat holding land at a fixed rate of rent is protected under cl. (4) of the provision of S. 37 of Act 11 [XI] of 1859 or under S. 160, Bengal Tenancy Act, as the case may be. In those cases it was held that a tenant at rent fixed in perpetuity may attain the status of an occupancy raiyat by the operation of S. 20 or S. 21, Bengal Tenancy Act, and would then be entitled to the benefit of protection under the aforesaid provisions. But there appears to be conflict of judicial opinions on the point in the Calcutta High Court itself. In 13 C.W.N. 1025⁵ his Lordship Mookerjee J. held that a raiyat holding at fixed rate does not after he has been in occupation for twelve years become a settled raiyat of the village and thus acquire a right of occupancy. Similar view was expressed by their Lordships Woodroffe and Newbold JJ. in Second Appeal No. 847 of 1913⁶ referred in 49 Cal. 280.³ Thus, in the Bengal Presidency itself, the question as to a tenant at rent fixed in perpetuity acquiring occupancy right in the holding cannot be regarded to be settled yet. For the purpose of decision of these appeals it does not seem necessary to enter into an examination of the debatable point raised by Mr. Raj Kishore Prasad. The view that I have taken of the terms of contract between the parties as embodied in the kabuliyats seems to me to be quite sufficient for the decision of these appeals. In the circumstances discussed the appeals must fail. I would dismiss the appeals with costs.

Fazl Ali C. J. — The difficult question raised in these appeals is whether a raiyat holding his land at a fixed rate of rent can claim remission of the rent on the ground

that the landlord has neglected to maintain the irrigation arrangements. Ordinarily, once the rents are fixed, no remission can be allowed. It appears that in a previous suit between the present plaintiff and some of the tenants of the village in which the defendants hold lands it was held that by reason of the special usage recorded in the *fard-abpashi* such a tenant is entitled to remission. My first inclination was that these appeals should be referred to a Full Bench for an authoritative pronouncement on the question raised in them, but after reading the judgment of my learned brother, I am not prepared to express dissent from the view expressed by him and I agree that these appeals should be dismissed with costs. But I must state that I am not altogether happy about the finding of fact arrived at by the lower appellate Court with regard to the alleged neglect of the plaintiffs in maintaining the irrigation arrangements. It is very easy for the defendants in a rent suit to assert that they are not liable to pay the full rent because the landlord has shown neglect in *gilandazi*; but the Courts should not accept such allegations specially when they are of a vague and general character in the absence of clear and cogent evidence as to the landlord's failure to discharge his obligation in regard to irrigation. In the present case the Munsif had dealt with the tenant's plea at some length and come to the conclusion that the *gilandazi* arrangements were adequate. In a case like this the Courts should try to find whether the arrangements are reasonably adequate or whether the landlords have been so remiss in their duty that the productivity of the tenants' land in the years in suit has been materially affected. The appellate Court has reversed the decision of the Munsif, but as his decision amounts to a finding of fact, I cannot say in second appeal that the Munsif's conclusions ought to be preferred. The appeals must, therefore, be dismissed, but I think that in any suit that may be brought for these lands in future the Courts should deal with the matter more carefully.

G.N.

Appeals dismissed.

[Case No. 33.]

A. I. R. (33) 1946 Patna 97

SINHA J.

Rameshar Mistri

v.

Babulal Pandit.

Second Appeal No. 291 of 1944, Decided on 19th September 1945, from decision of Addl. Sub-Judge, Bhagalpur, D/- 6th December 1943.

2. ('18) 5 A.I.R. 1918 Cal. 426 : 44 I. C. 543 : 27 C. L. J. 284, Lakhi Charan Saha v. Hamid Ali.

3. ('22) 9 A. I. R. 1922 Cal. 287 : 49 Cal. 280 : 63 I. C. 986, Sarbeswar Patro v. Bijay Chand.

4. ('28) 15 A. I. R. 1928 Cal. 880 : 56 Cal. 173 : 115 I. C. 81, Tarini Charan Sardar v. Sirish Chandra Pal.

5. ('09) 2 I. C. 675 : 13 C. W. N. 1025, Bhutnath Naskar v. Surendra Nath Dutt.

6. Reported in ('16) 3 A. I. R. 1916 Cal. 101 : 29 I. C. 563, Akhil Chandra Sen v. Tripura Charan.

Contract Act (1872), S. 25 — Compromise during pendency of suit is not without consideration — It is immaterial whether claim was false.

When the matter has been compromised during the pendency of the suit the compromise by a litigant irrespective of the rights and wrongs of the parties is a good consideration for the compromise. It may be that the suit was based on a false claim; but compromises are effected irrespective of the merits of the claim of either side : (30) 17 A.I.R. 1930 P. C. 168, *Disting.* [P 98 C 2; P 99 C 1]

J. C. Sinha — for Appellant.

K. Dayal — for Respondent.

Judgment. — This is a second appeal on behalf of defendant 2 from the decision of the learned Subordinate Judge of Bhagalpur modifying that of the Munsif of Madhipura in a suit for recovery of Rs. 215 principal with interest. The plaintiff alleged that defendant 1 who is the father of defendants 2 and 3 had incurred an oral debt to the plaintiff promising to pay interest at one per cent. per mensem. The defendants filed a written statement denying the transaction altogether and also adding that there was no necessity for incurring the loan and that there was no benefit to the joint family from the alleged loan. During the pendency of the suit, defendant 2 appellant along with the plaintiff are said to have filed a joint petition of compromise to the effect that defendant 2 bound himself to pay Rs. 200 in all in full discharge of the plaintiff's claim. This compromise petition was subsequently challenged by defendant 2 as spurious and fraudulent. The learned Munsif instead of holding a preliminary enquiry decided the whole suit on evidence holding that the transaction alleged by the plaintiff was not true, that is to say, that there was no borrowing by defendant 1. In that view of the matter, the trial Court dismissed the suit with costs. On appeal by the plaintiff the lower appellate Court came to the conclusion that the compromise petition had as a matter of fact been filed by the plaintiff along with defendant 2, that is to say, the Court found that there was no fraud on the Court.

As to whether there was a fraud upon defendant 2 himself, the Court held that this was question beyond the scope of the suit and that if and when a suit is brought to set aside the compromise that question may have to be decided. Taking the view that the compromise had been entered into by defendant 2 the Court passed a decree on the basis of the compromise against defendant 2, but the suit as against the other defendants

was dismissed. Hence this second appeal by defendant 2.

Counsel for the respondent plaintiff has taken the preliminary objection that no second appeal lies as the suit was one of the nature of Small Cause Court and the valuation being less than Rs. 500 under S. 102, Civil P. C., no second appeal is maintainable. Counsel for the appellant has conceded that no second appeal lies, but he has contended that the lower appellate Court has exercised its jurisdiction with material irregularity in allowing the compromise to be recorded and in passing a decree on the basis thereof. His contention is that on the lower appellate Court's finding that there was no transaction of lending between the plaintiff and defendant 1 the suit was a false one and that therefore such a suit could not have been compromised between the plaintiff and defendant 1. It is contended that the compromise alleged to have been arrived at between defendant 2 and the plaintiff is an unlawful compromise inasmuch as there was no consideration for the same. In my opinion, there is no substance in this contention. When the matter was compromised the suit was pending and the compromise by a litigant irrespective of the rights and wrongs of the parties is a good consideration for the compromise. It was next contended that such a compromise should not have been recorded inasmuch as it works injustice against defendant 2. Reliance is placed upon the observations of their Lordships of the Judicial Committee in 57 Cal. 1311¹ at p. 1321 which run as follows: "The words of the rule do not in terms appear to confer a discretion on the Court, but their Lordships desire to say nothing to prejudice the contention that the Courts retain an inherent power not to allow their proceedings to be used to work a substantial injustice, such as emerged in 1902 A. C. 465.²"

In the case before their Lordships as also in the one before the House of Lords the compromise had been entered into on behalf of counsel for the parties and not by the parties themselves. Hence the observations made either by their Lordships of the Judicial Committee of the Privy Council or by their Lordships of the House of Lords (1902 A.C. 465²) do not apply to a case like the present where the compromise was entered into by the litigant himself. On the findings of the learned Subordinate Judge

1. (30) 17 A.I.R. 1930 P. C. 158 : 57 Cal. 1311 : 57 I. A. 133 : 123 I. C. 545 (P.C.), *Sourendranath Mitra v. Tarubala Dasi*.

2. (1902) 1902 A. C. 465 : 71 L. J. K. B. 939 : 87 L. T. 341 : 51 W. R. 140, *Neale v. Gordon Lennox*.

his allegation that he was duped by intoxication by the plaintiff into entering into that compromise has not been accepted, the finding being that defendant 2 entered into the compromise with his eyes open, and he is bound by that compromise. It may be that he was very foolish in entering into that compromise, but the Courts do not exist to help foolish people out of their acts of foolishness. It may be that the suit was based on a false claim, but compromises are effected irrespective of the merits of the claim of either side. In a case like this the Court may be inclined to sympathise with a person in the position of defendant 2 appellant in this Court, but the law will take its course. In that view of the matter, in my opinion, there is no reason for interference even treating this appeal as an application in revision. The appeal is accordingly dismissed, but in the circumstances without costs.

R.K.

Appeal dismissed.

[Case No. 34.]

* **A. I. R. (33) 1946 Patna 99**

FAZL ALI C. J. AND PANDE J.

Md. Azim and others — Petitioners

v.

Md. Sultan and others — Opposite Party.

Civil Revn. No. 190 of 1944, Decided on 17th May 1945, from order of Sub-Judge, Chapra, D/- 4th December 1943.

* Civil P. C. (1908), O. 34, Rr. 7 and 8—Usufructuary mortgage — Preliminary decree for redemption — Default by mortgagor in paying amount declared under decree within time fixed — Mortgagor still can redeem and apply for final decree.

In the case of a usufructuary mortgage even after the period for payment of the amount declared due fixed in the preliminary decree has expired the plaintiff-mortgagor can apply for a final decree at any time before the right to redeem becomes barred. No question of limitation arises in such a case as the plaintiff-mortgagor has a right to apply for the final decree until his right to redeem the mortgaged property is barred. [P 100 C 2]

A preliminary decree in a suit for redemption of a usufructuary mortgage may, under R. 7 (1) (c) (i) fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property. [P 99 C 2; P 100 C 1]

Rule 7 (1) (c) (ii) does not apply to a usufructuary mortgage and therefore on default of payment by the plaintiff-mortgagor to pay the amount declared under the preliminary decree the usufructuary mortgagee cannot apply for a final decree. In the case of a usufructuary mortgage, it is only the plaintiff-mortgagor who can apply to the Court to pass a final decree and on payment of the amount declared due under the preliminary decree to order the mortgagee to put him in possession of the mortgaged properties. [P 100 C 1]

Rule 7 (2) does not apply to a usufructuary mortgage and therefore it is not necessary for the mortgagor to apply for extension of time fixed in the preliminary decree : 25 All. 231, *Rel. on*; 27 Cal. 705 ; 7 I. C. 50 (All.) and 22 Mad. 133, *Approved*. [P 100 C 1]

The plaintiff mortgagor in this case of a usufructuary mortgage was allowed to apply for a final decree and redeem the mortgaged property on payment of the amount declared due under the preliminary decree even nearly seven years after the preliminary decree was finally affirmed on dismissal of appeal by the High Court. [P 100 C 2]

Syed Hasan — for Petitioners.

M. Azizullah — for Opposite Party.

Pande J.—This is an application against the order dated 4th December 1943 of the Subordinate Judge, First Court, Chapra, which disallowed the petitioners' prayer for permission to deposit the decretal amount under a preliminary decree for the redemption of a *zarpeshgi* bond. It appears that the preliminary decree was passed on 15th May 1931. On appeal the appellate Court directed that

"if the plaintiff deposits or pays Rs. 150 before Jeth next, he shall get a final decree for possession with effect from Asarh next."

This order was made on 22nd July 1932 that is, after the month of Jeth of that year. Therefore, under the preliminary decree as modified by the appellate Court, the petitioners were required to pay the amount of Rs. 150 before the month of Jeth of 1933. Against that order there was an appeal to the High Court which dismissed the appeal on 12th December 1935. The petitioners failed to make payment till September 1942 when an application was made on their behalf to the original Court to accept the decretal amount by extending the time. The learned Munsif rejected the prayer. The order was affirmed by the learned Subordinate Judge who heard the appeal. Hence this petition.

It has been urged for the petitioners that before a final decree debarring the plaintiff's from all right to redeem the mortgage property is passed, they are entitled to redeem the mortgage on payment of the amount declared by the preliminary decree even after the expiry of the time for payment fixed by the Court. The learned advocate for the opposite party contended that the petitioners' right to redeem the mortgage under the preliminary decree is barred by the operation of Art. 181 of Sch. 1, Limitation Act.

Now a preliminary decree in a suit for redemption of a usufructuary mortgage may, under cl. (c) (i) of R. 7 (1) of O. 34, Civil P. C., fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount de-

clared under the decree within the time fixed does not operate to debar the plaintiff mortgagor from all right to redeem the mortgaged property. If payment of the amount declared due under the preliminary decree is not made within the time fixed by the Court, then under cl. (c) (ii) of R. 7 (1) a mortgagee defendant is entitled to apply for a final decree in the case of a mortgage other than a usufructuary mortgage. It follows that the mortgagee is not entitled to apply for a final decree in the case of a usufructuary mortgage. It is only the plaintiff-mortgagor who can apply to the Court to pass a final decree and on payment of the amount declared due under the preliminary decree *to order the mortgagee to put him in possession of the mortgaged properties*. The terms of final decree in the case of a mortgage other than a usufructuary mortgage vary according to the nature of the mortgage as provided by sub-r. (3) of R. 8 of O. 34, Civil P. C. The obvious reason for the exception in regard to usufructuary mortgage from the effect of default in making payment of the decretal dues within the time fixed by the Court seems to be that the mortgagee being in possession of the property, his interest is not in any way affected by the plaintiff's failure to make payment within the time fixed by the preliminary decree. It is the mortgagor's interest that suffers for until he makes payment he cannot get back the mortgaged property.

In the case of a usufructuary mortgage the mortgagor need not ask for extension of the time fixed for payment by the preliminary decree under the provision of sub-r. (2) of R. 7. The provisions of that sub-rule apply to the case of mortgage for foreclosure or sale only. The effect of extension of time under the said sub-rule is postponement of the time for passing the final decree for foreclosure or sale, as the case may be, which is not allowed in the case of a usufructuary mortgage.

The mortgagor's right to redeem the mortgaged property subsists until a final decree debars the mortgagor from all right to redeem, and that in the case of a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale. In the case of a final decree that provides for sale of the mortgaged property, or a sufficient portion thereof, to satisfy the mortgage-debt, the mortgagor is entitled to redeem the mortgaged property even after sale has taken place but before confirmation of the sale.

It is in the case of a mortgage decree by conditional sale, or anomalous mortgage the terms of which provide for foreclosure only, where the final decree declares the plaintiff debarred from all right to redeem the mortgaged property, or, where in pursuance of the final decree the mortgaged property has been sold and the sale is confirmed, that the right to redeem is extinguished. In other cases the right to redeem the mortgaged property subsists, and so long the right is there, it is always open to a mortgagor to avail himself of that right on payment of the amount declared due under the preliminary decree.

The above view finds support from several reported decisions of which the following may be referred: 4 C. W. N. 699,¹ 7 I. C. 50,² 25 ALL. 231³ and 22 Mad. 133.⁴ These cases are authority for the proposition that the right of redemption is not lost until the order absolute for foreclosure is made. The case in 25 ALL. 231³ seems to be directly in point. It was a case of a usufructuary mortgage. The preliminary decree was passed in the year 1893 and the mortgagor deposited the decretal dues in the year 1901. It was held that the mortgagor was entitled to redeem.

In the above view of the law it must be held that the petitioners are entitled to redeem the mortgaged property on payment of the amount declared due under the preliminary decree even though they offered to deposit the amount nearly seven years after the preliminary decree was finally affirmed on dismissal of the appeal by the High Court. On payment of the decretal dues the petitioners shall be entitled to apply to the Court to pass a final decree directing the opposite party to put the petitioners in possession of the mortgaged property. Therefore the petition must succeed.

The advocate for the opposite party contended that the petitioner's right to redeem the mortgaged property under the preliminary decree is barred by limitation, but no question of limitation arises in this case as the plaintiff has a right to apply for the final decree until his right to redeem the mortgaged property is barred. It is not disputed that the plaintiff has still the right to redeem the property, but it is contended that

1. (1900) 27 Cal. 705 : 4 C. W. N. 699, Shaikh Somesh v. Ram Krishna.

2. ('10) 7 I. C. 50 (All.), Pardas Singh v. Dwarka Singh.

3. ('03) 25 All. 231, Saligram v. Muradan.

4. ('99) 22 Mad. 133, Narayan Reddi v. Papayya.

he should bring a fresh suit for redemption. I do not think that it is necessary to compel him to bring a fresh suit if the appropriate remedy can be granted in this litigation. In the circumstances I would allow the petition with costs. Hearing fee one gold mohur.

Fazl Ali C. J. — I agree.

G.N.

Petition allowed.

[Case No. 35.]

A. I. R. (33) 1946 Patna 101

SHEARER J.

Baleshwar Bhagat — Petitioner
v.

Emperor.

Criminal Revn. No. 171 of 1945, Decided on 27th March 1945, from order of Addl. Sessions Judge, Bhagalpur, D/- 22nd December 1944.

Penal Code (1860), S. 214 — Person tried separately for an offence under R. 81 (4), Defence of India Rules and under S. 214, Penal Code, for concealing offence under R. 81 (4) — Conviction in both trials—On appeal, conviction under Rule 81 (4) set aside — Revision against conviction under S. 214—Held conviction under S. 214 must be set aside as Court was bound to assume that no offence under R. 81 (4) was committed — Criminal P. C., Section 403.

A Court dealing with a charge under S. 214, Penal Code, is not entitled to question or review the correctness of the decision of another Court acquitting a person charged with having committed the offence which the person before it is charged with having attempted to conceal.

[P 101 C 2]

The accused was tried and convicted for an offence under R. 81 (4), Defence of India Rules, for exporting certain goods without permit. He was also tried separately for offering a gift to conceal the above offence, under S. 214, Penal Code, and was convicted. On appeal the conviction under R. 81 (4) was set aside and the accused was acquitted. The accused therefore filed a revision against his conviction under S. 214 :

Held the Court was bound to proceed on the assumption that no offence under R. 81 (4), Defence of India Rules, was committed. The accused could not therefore be said to have committed an offence under S. 214, Penal Code, and his conviction should be set aside : 37 Bom. 658 and 14 Mad. 400, *Foll.*

[P 102 C 1]

Penal Code —

(‘45) Ratanlal, Page 532, Note “In consideration, etc.”

(‘36) Gour, Page 753, N. 2345 and N. 2346.

Safdar Imam — for Petitioner.

Government Pleader — for the Crown.

Order. — The petitioner, Baleshwar Bhagat, was arrested on 24th February 1944, at the Bhagalpur railway station by two Sub-Inspectors of Police. He was then about to board a train for Bolepur, in the Province of Bengal ; and as he had a season ticket in his possession, it may be presumed

that he had been in the habit of making this journey frequently. The reason why the two Sub-Inspectors took him into custody was that they had reason to suspect that he had been exporting goods to Bengal without a permit, and more particularly that he intended to take with him on this occasion to Bolepur five boxes which contained sugar and ghee and other goods which he was not entitled to export except under a permit which admittedly he did not possess. The boxes were apparently lying on the platform outside the compartment of the train into which the petitioner was about to get.

Immediately after he was apprehended the petitioner is said to have offered the Sub-Inspectors a sum of Rs. 100 if they would take no action against him. For this he was prosecuted and convicted under S. 214, Penal Code, and it is against this conviction that the present application has been preferred. The petitioner was also tried and convicted under R. 81 (4), Defence of India Rules, and when the learned Additional Sessions Judge heard the appeal, out of which this application arises, this conviction was subsisting. Shortly afterwards, however, the conviction was set aside on appeal by the learned Sessions Judge. The point taken by Mr. Safdar Imam, who appears in support of the application, was therefore, not a point that could have been taken in the lower appellate Court. Mr. Safdar Imam contends that, in the view of the matter taken by the learned Sessions Judge, no offence under R. 81 (4), Defence of India Rules, was committed and that, in consequence, even if his client did offer money to the Sub-Inspectors of Police he did not commit an offence under S. 214, Penal Code. This argument of the learned counsel for the petitioner is supported by decisions of Division Benches of the High Courts of Madras and Bombay : 14 Mad. 400¹ and 37 Bom. 658.² In the latter decision it was pointed out that a Court dealing with a charge under S. 214, Penal Code, is not entitled to question or review the correctness of the decision of another Court acquitting a person charged with having committed the offence which the person before it is charged with having attempted to conceal. I respectfully agree with these decisions and have no doubt myself but that they are correct. The petitioner did not have the sum of Rs. 100 on his person and did not actually

1. (‘91) 14 Mad. 400, *Queen-Empress v. Saminatha*.

2. (‘13) 37 Bom. 658 : 20 I. C. 613, *Emperor v. Sanalal Lallubhai*.

produce and offer any money to the Sub-Inspectors. Nor, after he realised that they were determined to prosecute him, did he return to the police-station or make any further attempt to seduce them from their duty. In these circumstances, it was, I think a pity that two separate prosecutions were instituted. The better course would have been to adduce evidence of what the petitioner said to the Sub-Inspectors at the other trial where he was charged with an offence under R. 81 (4), Defence of India Rules, and ask the Court to take his conduct into consideration in awarding sentence. His conduct in offering money to the Sub-Inspectors was really mainly of importance as going to show that the boxes in fact belonged to him. If this evidence had been before the learned Sessions Judge, and the learned Sessions Judge had thought it was true, the learned Sessions Judge could scarcely have taken the view of the matter which he did, namely, that the boxes really belonged to some *Marwari* who had been seen near about them and that the Sub-Inspectors made a mistake in arresting the petitioner. I must say that I entertain a good deal of doubt as to the correctness of the decision of the learned Sessions Judge and if the Provincial Government had preferred an appeal against the order of acquittal, I should have been disposed to adjourn the hearing of the present application. But, as matters stand, I am bound, following the decision in 37 Bom. 658,² to proceed on the assumption that no offence under R. 81 (4), Defence of India Rules, was committed, and, therefore, to set aside this conviction and sentence under S. 214, Penal Code. The petitioner is discharged from his bail.

K.S.

Conviction set aside.

[Case No. 36.]

A. I. R. (33) 1946 Patna 102

BEEVOR J.

Mohammad Yunus

v.

Bishunath Singh.

Appeal No. 522 of 1944, Decided on 17th September 1945, from appellate decree of Sub-Judge, Arrah, D/- 6th April 1944.

(a) Landlord and tenant — Settlement of land by one of several cosharers — Validity — Acquisition of status as raiyat.

Where land belonging to a number of cosharers-landlords is settled by one of them and the settlement is recognised by the other cosharers the settlement must be treated as having been made with the authority of all the cosharers so as to confer the status of a raiyat on the person settled

on the land : ('43) 30 A.I.R. 1943 Pat. 194 (F.B.), *Rel. on.* [P 102 C 2 ; P 133 C 1]

(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 112A — Husband proprietor of 10 annas milkiat and wife usufructuary mortgagee of remaining milkiat—No notice of rent reduction proceedings served on wife — Order reducing rent is without jurisdiction.

The husband was the proprietor of 10 annas 8 pies *milkiat*, while his wife was the usufructuary mortgagee of the remaining *milkiat*. No notice of the rent reduction proceedings was served on the wife and she was not made a party to those proceedings :

Held that the order passed by the Revenue Officer for reduction of rent was without jurisdiction : ('42) 29 A.I.R. 1942 Pat. 258 and ('23) 10 A.I.R. 1923 Cal. 364, *Rel. on* ; ('45) 32 A.I.R. 1945 Pat. 320, *Disting.* [P 103 C 1]

Rai I. B. Saran and Md. Yousuf —

for Appellants.

Nawal Kishor Prasad II— for Respondent.

Judgment. — The plaintiffs-appellants sued for declaration that certain reduction of rent made by Revenue Officer was made without jurisdiction. The plaintiffs are husband and wife. The husband is the proprietor of 10 annas 8 pies *milkiat*, while his wife is the usufructuary mortgagee of the remaining *milkiat*. It has been found that the wife (plaintiff 2) was not made a party to the rent reduction proceedings. It was also urged that the finding of the lower Court that the defendants had acquired occupancy right was incorrect in law, and further that the order of the Revenue Court was without jurisdiction because an amendment of the application was allowed by the Revenue Officer interfering in the matter. Dealing with the last point first, I find that there is nothing to show what the amendment was, if any, and I must, therefore, hold that this point fails.

As regards the second point, I am not satisfied that the appellants are entitled to relief on this basis. Certainly, it seems to have been found by the lower Courts that the settlement with the defendants was made by one Mt. Abhilakhi Kuer, whose interest in the *milkiat* was only 14 annas 6 pies. But the evidence of the defendants was that the other landlords had recognized the settlement, and although a Full Bench of this Court decided in A.I.R. 1943 Pat. 194¹ that a person who is inducted upon the land belonging to a number of cosharers landlords by one cosharer without the consent or authority express or implied of the other cosharers is not a *raiya*, it was recognized

1. ('43) 30 A.I.R. 1943 Pat. 194 : 22 Pat. 382 : 207 I.C. 353 (F.B.), *Kaniz Fatma v. Hossainuddin Ahmad.*

by that very decision that in some instances settlement made by one cosharer may be treated as having been made with the authority of all. In the present case, the plaintiffs' case was that the defendants never got possession at all until after 1929. The finding was that they got possession at least as far back as 1923, and I do not think that it was open to the plaintiffs to change their case knowing that the settlement was invalid, because it was made only by a co-sharer landlord.

It seems to me, however, that the plaintiffs' appeal must succeed on the first ground. It was laid down in A.I.R. 1942 Pat. 258² that an order by the Revenue Officer for reduction of rent passed without giving notice to the decree-holder, who had obtained a decree for rent, was without jurisdiction, and this decision was based on a previous decision of the Calcutta High Court in 37 C. L. J. 473³ which had the general application to that case.

On behalf of the defendants-respondents, I have been referred to the decision reported in 1945 P. W. N. 221.⁴ That was a case in which a notice was issued, and actually served on some persons as being the agent of the landlord, though unfortunately it seems to have been served on the wrong person. In the present case, it does not appear that any notice was ever issued or could have been issued to any one by the Revenue Officer as to a person being the agent of plaintiff 2. In these circumstances, I must hold that the Revenue Officer's order was without jurisdiction, and the plaintiffs are entitled to a declaration to that effect. In view, however, that no explanation is forthcoming why plaintiff 1 failed to take this objection in the Revenue Court, there would be no order for costs in this suit.

G.N.

Appeal allowed.

2. ('42) 29 A.I.R. 1942 Pat. 258 : 199 I. C. 222, Nand Kishore v. Basdeo Singh.

3. ('23) 10 A.I.R. 1923 Cal. 364 : 72 I. C. 37 : 37 C. L. J. 473, Gora Chand v. Rakhal Chandra.

4. ('45) 32 A.I.R. 1945 Pat. 320 : 1945 P. W. N. 221, Dwarka Nath Sen v. Dhanoo Gope.

[Case No. 37.]

A. I. R. (33) 1946 Patna 103

BEEVOR J.

Saral Sonar

v.

Sudama Singh.

Appeal No. 420 of 1944, Decided on 19th September 1945, from appellate decree of Second Sub-Judge, Arrah, D/- 15th February 1944.

Landlord and tenant — Suit for ejectment — Alleged tenancy not established — Suit can be decreed on title.

Where in a suit for ejectment on the allegation that a monthly tenancy has been determined by a notice to quit, the plaintiff fails to establish the tenancy, the suit can be decreed on the basis of plaintiff's title, either on the finding that the plaintiff was in possession within 12 years of the suit or that the defendant's possession was permissive : 25 All. 256 (F.B.) and ('36) 23 A. I. R. 1936 Pat. 147, *Rel. on.* [P 103 C 2; P 104 C 1]

T. P. Act —

('45) Chitaley, S. 105, N. 19, Pt. 2.

R. S. Sinha — for Appellants.

Sailesh Chandra De — for Respondents.

Judgment. — The plaintiff-respondent brought a suit to eject the appellant from a certain house alleging that he had been a monthly tenant since 1937 but the tenancy had been determined by notice. The lower appellate Court found that the tenancy had not been proved but that the plaintiff had established his title and that the defendants came into possession with the plaintiff's permission and he, therefore, gave a decree for recovery of possession. It is urged that when the plaintiff's case about the tenancy had failed the suit should have been dismissed. A number of cases were cited before me and somewhat different views seem to have been taken on similar questions in the High Courts in India in different cases but the only two cases where the facts seem to have raised the question in a form very similar to the one now before me are a Full Bench decision reported in 25 ALL. 256¹ and a decision of a Judge of this Court reported in 1936 P. W. N. 129.² The Full Bench decision of the Allahabad High Court was almost exactly similar to the facts of the present case. The plaintiff came into Court alleging that the defendant had hired a house from him at a monthly rent and the plaintiff had given her notice to quit. The findings of the Court of first appeal after remand of issues by the High Court were that the plaintiff was the owner of the house, that the defendant occupied the house as a friend with the permission of the plaintiff and that the defendant had never before asserted her title to the house and that her possession was permissive. It was held that the plaintiff was entitled, upon the facts found, to a decree for possession notwithstanding that his case had been that the defendant was his tenant.

1. ('03) 25 All. 256 (F.B.), Abdul Ghani v. Mt. Babni.

2. ('36) 23 A.I.R. 1936 Pat. 147 : 161 I. C. 585 : 1936 P. W. N. 129, Mahomed Yusuf v. Mahomed Waheed.

In 1936 P. W. N. 129² again the plaintiff claimed to have been the landlord and to have served a notice on the defendants to quit. The defendants pleaded title by adverse possession. The plaintiff proved title and possession within 12 years but failed to prove that the defendants were tenants. It was held that on the facts found the plaintiff was entitled to eject the defendants. In 1936 P. W. N. 129³ there was a finding that the plaintiff had been in possession within 12 years whereas in the present case, as in the case which came before the Full Bench in 25 ALL. 256,¹ it was found that the defendants' possession was permissive. Either finding will be sufficient to overrule a plea of limitation in a suit for declaration of title and recovery of possession and I, therefore, do not think that this difference in any way distinguishes the present case from the principle of the case decided in 1936 P. W. N. 129.² For these reasons I hold that this appeal must fail and it is, therefore, dismissed but in view of the fact that the plaintiff-respondent did not put forward a correct case in the trial Court there will be no order for costs in this Court. Leave to appeal under the Letters Patent is refused.

D.R./D.H.

Appeal dismissed.

[Case No. 38.]

A. I. R. (33) 1946 Patna 104

PANDE J.

Bibi Zainab — Petitioner.

v.

Anwar Khan — Opposite Party.

Criminal Revn. No. 177 of 1945, Decided on 25th June 1945, from order of Sessions Judge, Muzaffarpur D/- 8th December 1944.

(a) Criminal P. C. (1898), S. 439—Limitation—Revision petition admitted by Court—Plea of limitation does not apply as there is no period prescribed for such application.

Once a revision petition has been admitted by the High Court it has got to be considered on its merits and the plea of limitation does not apply particularly when there is no period of limitation prescribed by the statute for such application.

[P 105 C 1]

Hence where a revision petition against the order rejecting petition under S. 488, Criminal P. C., is filed and is admitted by the High Court, the plea that the application is barred by time as it was filed long after the order was made by the Magistrate, is not maintainable: (42) 29 A. I. R. 1942 Pat. 150, *Rel. on.*

[P 104 C 2]

Cr. P. C. —

(41) Chitaley, S. 439, N. 42, Pt. 1.

(41) Mitra, Page 1466, N. 1222.

[Note.—There is no period of limitation prescribed by statute for application for revision. But as a matter of practice a period of 60 days is treated in

some High Courts as the limit of time within which the revision application is to be filed.—*Ed.*]

(b) Criminal P. C. (1898), Ss. 488 and 202 — Application under S. 488 is not complaint—It cannot be referred to another official for inquiry under S. 202.

An application under S. 488 is not a criminal complaint within the meaning of the Criminal Procedure Code. Therefore, the petition, not being a complaint, cannot be referred to another official for inquiry under S. 202. Section 488 clearly contemplates that the inquiry should be made by the Magistrate himself and that function cannot be delegated to another officer. [P 105 C 1]

Cr. P. C. —

(41) Chitaley, S. 488, N. 25.

(41) Mitra, Page 1550, N. 1272A.

(c) Criminal trial — Evidence — Expert evidence — Thumb impressions, genuineness of — Finger print expert should be examined.

Where the genuineness of documents bearing thumb impressions and produced before a Magistrate, is in question, the proper procedure is to examine a finger print expert. The Magistrate should not take upon himself the function of a finger print expert to compare the finger prints.

[P 105 C 1]

*Quazi Nazrul Hussain — for Petitioner.**S. Anwar Ahmad — for Opposite Party.*

Order.—This petition is against the order of the Sub-divisional Magistrate of Hajipur by which he rejected the petitioner's petition under S. 488, Criminal P. C., for maintenance. It appears that the application was made by the wife of the opposite party to the Magistrate on 23rd June 1944, and the Magistrate issued notice upon the husband to show cause why he should not be directed to pay maintenance of Rs. 20 per month. The opposite party appeared on the date fixed and took time. On the next date the opposite party filed a petition alleging that the wife of the petitioner was living in adultery. The Sub-divisional Magistrate referred the matter to the Sub-Registrar of Mehnar for enquiry and report. On receipt of the report the Magistrate appears to have considered some divorce certificate and other papers which bore thumb impression and then dismissed the application of the petitioner by his order dated 4th September 1944. She then moved the Sessions Judge of Muzaffarpur who rejected the petition as not maintainable. Thereupon a petition was filed before this Court and it was admitted.

A preliminary objection has been taken on behalf of the opposite party to the effect that the application is barred by time as it was filed long after the order was made by the Magistrate. The learned advocate for the petitioner referred to a decision in A.I.R. 1942 Pat. 150¹ where a similar objection was I. (42) 29 A. I. R. 1942 Pat. 150 : 199 I. C. 218, *Lalo Mahton v. Emperor.*

raised regarding an application against conviction under S. 426, Penal Code. Verma J. rejected the objection with the observation that once a revision case has come before the High Court it can deal with it under Ss. 435 and 439, Criminal P. C., and it is not necessary for the High Court to see whether the petition was made within 60 days particularly as there is no limitation prescribed by statute for such petition. I think that once a petition has been admitted by the Court it has got to be considered on its merit and the plea of limitation does not apply particularly when there is no period prescribed by the statute for such application. Therefore the preliminary objection fails. As to the merit it has been urged by the learned advocate for the petitioner that the Sub-divisional Magistrate was wrong in treating the application under S. 488 as a complaint and in referring it to the Sub-Registrar for enquiry and report. There are certain reported decisions in which it has been already held that an application under S. 488, Criminal P. C., is not a criminal complaint within the meaning of the Criminal Procedure Code. It is sufficient to refer to one case: 10 Lah. 406.² Therefore, the petition not being a complaint could not have been properly referred to another officer for enquiry under S. 202, Criminal P. C. The procedure dealing with an application under that section is laid down in that section itself. Clause (6) of the section provides that all evidence under that Chapter shall be taken in the presence of the husband or father as the case may be, or when the personal attendance is dispensed with, in the presence of the pleader. The section clearly contemplates that the enquiry should be made by the Magistrate himself and that function cannot be delegated to another officer. In the present case the learned Magistrate on receiving the Sub-Registrar's report appears to have given no opportunity to the petitioner to meet the report, rather he took upon himself the function of a finger print expert in comparing the petitioner's signature on a certain paper said to be a divorce paper and one other paper. The learned Magistrate might have studied the art of examination of finger print, but the proper procedure in such cases is to examine a fingerprint expert, for, the Magistrate by himself comparing the signature rendered himself a witness in the case. On the whole it appears to me

2. ('29) 16 A. I. R. 1929 Lah. 32 : 10 Lah. 406 : 112 I. C. 218, *Maher Khan v. Mt. Bakhta Bhari*, 1946 P/14 & 15

that the application of the petitioner was rejected after enquiry of a very summary nature, and that is not a regular order. Therefore the order of dismissal of the application must be set aside and the case remitted to the Magistrate for disposal in accordance with law.

D.S./D.H.


Case remitted.

Advocate High Court

[Case No. 39.]

A. I. R. (33) 1946 Patna 105

BEEVOOR ~~Sri~~hagar,

Mirtunjay Singh and others 

Appellants

v.

Juga Uraon and others—Respondents.

Appeal No. 47 of 1944, Decided on 28th March 1945, from appellate decree of Addl. Sub-Judge, Hazaribagh, D/- 21st September 1943.

Chota Nagpur Tenancy Act (6 [VI] of 1908), Ss. 240, 64 (3) and 67—S. 240 does not prevent landlord from giving consent to person who is not *mundari khuntkattidar* for creating *Korkar* in *mundari khuntkattidari* tenancy — Landlord not making application under S. 64 (3) — Person cannot be ejected — Person acquires occupancy right, not by adverse possession, but under S. 67.

If a landlord merely gives a consent to the creation of *korkar* in a particular village or area to a particular person, that consent itself does not create any tenancy and does not, therefore, amount to any transfer or alienation of any portion of his interest by the landlord. There is, therefore, nothing in S. 240 which will prevent the landlord from giving his consent to a person, who is not a *mundari khuntkattidar* for converting the land into *korkar* in the *mundari khuntkattidari* tenancy.

[P 107 C 1]

Where such a person, with the consent of the landlord, actually creates *korkar* in the land, S. 64 (3) is applicable, and if no application to eject him is filed before the Deputy Commissioner within two years when he started converting the land into *korkar*, he cannot be ejected.

[P 107 C 1, 2]

Strictly speaking it is not correct to say that such a person acquires an occupancy right or title by adverse possession. After the application of S. 64 (3), S. 67 comes into force and it is under this section that the title accrues to him ('28) 15 A.I.R. 1928 Pat. 87, *Rel. on*; ('23) 10 A.I.R. 1923 P. C. 205, *Ref.*

[P 107 C 2]

Sarjoo Prasad and A. B. N. Sinha—

for Appellants.

L. K. Chaudhari — for Respondents.

Judgment.—This is an appeal against a decision of the Additional Subordinate Judge of Hazaribagh reversing a decision of the Munsif of Hazaribagh and decreeing the suit for declaration of title in respect of eight annas odd share of land which have been attached under S. 146, Criminal P. C.

The land in question was within the zemindary of defendants 9 and 10 who have been held to be *mundari khuntkattidars*,

which is in accordance with the survey record of rights, though an attempt was made on behalf of the plaintiff-respondents to dispute this fact in the lower Courts. The plaintiffs are not *mundas*. The plaintiffs allege that they got settlement of certain land in 1922 from the father of defendants 9 and 10 and made some reclamation extending beyond the limits of the land then settled with them. They allege that they took a further settlement in 1937 from defendants 9 and 10. The lower Courts have held that as the plaintiffs were not *mundari khuntkattidars* any settlement with them was invalid under the provisions of s. 240, Chota Nagpur Tenancy Act. The lower appellate Court has, however, held that the plaintiffs were entitled to a decree on the basis that they have acquired rights of occupancy by adverse possession in accordance with the decision in A. I. R. 1928 Pat. 87.¹ In that decision in A. I. R. 1928 Pat. 87,¹ the plaintiffs sued the defendants for possession of lands alleging that the defendants had dispossessed them. They claimed to have themselves made the lands into *korkar* by preparing them for paddy cultivation. It was decided that it is not merely a tenant or resident of a village who can make *korkar* in that village, and that where the tenants' reclaimed lands of a certain village and *mundari khuntkattidars* sued as *maliks* to eject them after the expiry of two years from the commencement of that reclamation, they could not be ejected from the land as the suit was barred under s. 64 (3), Chota Nagpur Tenancy Act.

It was urged for the respondent that there is no finding by the appellate Court that the plaintiffs actually made *korkar* of the land now in suit. It is true that the plaint and the written statement do not mention the word *korkar*. The plaintiffs had claimed to have reclaimed the land in suit but did not state specifically in their plaint that they had reclaimed it as paddy land. By a reference to the evidence, however, I have ascertained that it was the case of both parties that the land had been converted into paddy land, and it is also clear that in the trial Court there was a dispute in the evidence as to whether the land had been reclaimed by the plaintiff or by the defendant, and the trial Court accepted the plaintiff's evidence on this point. Now, the appellate Court in dealing with the question of posses-

sion has stated, after referring to certain documents :

"Then again there is the oral evidence of the plaintiffs' witnesses whose evidence has been believed by the learned Munsif for reasons recorded by him in his judgment and which I do not consider necessary to reiterate here."

Later he stated :

"The position therefore is this that plaintiffs have been in possession of the suit lands under an invalid lease ever since March, 1923 without any objection by the landlord and hence I am of opinion that they have acquired a right of occupancy by adverse possession : vide A. I. R. 1928 Pat. 87.¹ There is nothing in Chap. 18 of the Chota Nagpur Tenancy Act to prevent accrual of occupancy rights in *korkar* lands brought into cultivation out of the *mundari khuntkatti* lands : vide A. I. R. 1928 Pat. 87.¹"

If these passages are read together, I think it is impossible to understand the lower appellate Court's judgment as meaning anything less than that he accepted the case that the plaintiffs reclaimed the land though he has not said so in so many words.

It is also clear, as I have said that the reclamation which both parties were putting forward was reclamation and conversion of the lands into paddy lands from jungle or upland and this amounted to the creation of *korkar* provided there was no legal bar to prevent the land or reclamation from becoming *korkar*.

It is urged on behalf of the respondents that s. 64 (3), Chota Nagpur Tenancy Act, does not apply to lands situated in a *mundari khuntkatti* tenancy. Section 64 (3), runs as follows :

"Where the consent of the landlord is required by this section for the conversion of land into *korkar*, such consent shall be deemed to have been given if, within two years from the date on which the cultivator commenced such conversion, the landlord has not made an application to the Deputy Commissioner for the ejectment of the cultivator and no cultivator who is a tenant or resident of a village, shall be ejected from land of that village, which he has commenced to convert into *korkar*, otherwise than upon such an application."

Now strictly speaking it is clear that the decision in A. I. R. 1928 Pat. 87¹ is an authority for the proposition that this subsection does apply to lands in a *mundari khuntkattidari* tenancy. But the argument may be, and has been put in a slightly different form, namely, that the right to create *korkar* in a *mundari khuntkatti* tenancy is restricted by s. 240 of the Act. This section contains a number of sub-sections. Sub-section (1) provides that no *mundari khuntkattidari* tenancy or a portion thereof shall be transferable by sale subject to the proviso with which we are not concerned.

1. (28) 15 A. I. R. 1928 Pat. 87 : 105, I. C. 58, Lal Sahi Palian v. Deba Munda.

Sub-section (2) deals with that proviso. Sub-section (3) provides that no mortgage of a *mundari khuntkattidari* tenancy or portion thereof shall be valid subject to the exception with which we are not concerned. Sub-section (4) provides that no lease of a *mundari khuntkattidari* tenancy or any portion thereof shall be valid except of two kinds with which we are not concerned. Sub-section (5) provides a further restriction on certain mortgage which would otherwise be valid. Sub-section (6) states :

"No transfer of a *mundari khuntkattidari* tenancy or any portion thereof, by any contract or agreement made otherwise than as provided in the foregoing sub-sections, shall be valid; and no such contract or agreement shall be registered."

Sub-section (7) provides that nothing in the foregoing sub-sections shall affect certain transactions made before the commencement of the Chota Nagpur Tenancy Act. In my opinion, it is quite clear that if a landlord merely gives a consent to the creation of *korkar* in a particular village or area to a particular person, that consent itself does not create any tenancy and does not, therefore, amount to any transfer or alienation of any portion of his interest by the landlord. I can, therefore, find nothing in S. 240 of the Act which will prevent the landlord from giving consent to a person, who is not a *mundari khuntkattidar* for converting the land into *korkar* in the *mundari khuntkattidari* tenancy. Having held that S. 240 provides no such prohibition it follows that if consent could be granted to a *mundari khuntkattidar* to create *korkar* in a particular area, consent could be granted to a person who is not a *mundari khuntkattidar* to create *korkar* in the same area or tenancy. The decision in A. I. R. 1928 Pat. 87¹ clearly shows that consent may be given to a *mundari khuntkattidar* to create *korkar* in a *mundari khuntkattidari* tenancy even though he is not a raiyat within that tenancy. I, therefore, hold that consent may also be given in similar circumstances to a person who is not a *mundari khuntkattidar*. There was, therefore, nothing to prevent the landlord giving consent to the present plaintiff-respondents creating *korkar*. It is clear from the findings of the lower Courts, as I have stated, that the plaintiffs did actually create *korkar* in the land, and in these circumstances I find that S. 64 (3), Chota Nagpur Tenancy Act is applicable, and no application to eject the plaintiffs having been filed before the Deputy Commissioner within two years of the

date when they started converting the land into *korkar*, they cannot be ejected.

Strictly speaking I think that it is incorrect to say that the plaintiffs have acquired an occupancy right or title by adverse possession. They have acquired a title under the provisions of the Chota Nagpur Tenancy Act by acts which are permitted in this area under that Act. For these reasons I do not think it is necessary to discuss at any length the decision of the Privy Council in 47 Bom. 798² which was cited on behalf of the respondents for the proposition that where an alienation is prohibited in the interest of the estate, a person cannot acquire a title to such property by adverse possession for 12 years. In order to make the judgment complete, I should mention that after the application of S. 64 (3), Chota Nagpur Tenancy Act, S. 67 of that Act comes into force. That section provides that every raiyat who cultivates or holds land which he or any member of his family has converted into *korkar* shall have a right of occupancy in such land, notwithstanding that he has not cultivated or held the land for a period of twelve years. It is under this section that the title accrues to the plaintiff-respondents.

For these reasons, I come to the conclusion that the appeal fails and should be dismissed. In view, however, of the fact that the plaintiff-respondents framed the case in the trial Court and even before the lower appellate Court on the basis of a lease or leases which have been held to be invalid, and they failed to put clearly in the plaint the claim of title based on S. 67, Chota Nagpur Tenancy Act, on which they have succeeded, there will be no order for costs in this Court. Leave to appeal under the Letters Patent is refused.

V.R./D.H.

Appeal dismissed.

2. ('23) 10 A. I. R. 1923 P. C. 205 : 47 Bom. 798 : 50 I. A. 255 : 74 I. C. 362 (P. C.), Madhavrao Waman v. Raghunath Venkatesh.

[Case No. 40.]

A. I. R. (33) 1946 Patna 107

BEEVOR J.

Gangadhar Sahu — Petitioner

v.

Emperor.

Criminal Revn. No. 389 of 1945, Decided on 11th April 1945, from order of Sessions Judge, Darbhanga, D/- 31st January 1945.

Defence of India Rules (1939), R. 130 (1) — Report of facts constituting offence under Defence of India Rules, what constitutes —

Report mentioning allegations of facts which if true would lead to disclosure of offence under Defence of India Rules — Report does not comply with R. 130.

In order to comply with R. 130, it is necessary that a public servant must make himself responsible for the *prima facie* existence of such facts as will constitute the offence. [P 108 C 1, 2]

A report by the public servant stating that allegations had been made in his presence of certain facts which allegations if true would have disclosed an offence under the Defence of India Rules, is not a report of the facts constituting the offence and as such does not fall under R. 130.

[P 108 C 1]

Azizullah — for Petitioner.

Gopal Prasad — for the Crown.

Order. — The petitioner has been convicted under R. 81 (4), Defence of India Rules for having sold kerosene oil above the maximum controlled price.

It is urged that there was no legal cognizance of the offence taken. The complaint was filed by one Shyam Jha who is not a public servant. The Sub-divisional Magistrate sent the matter to the Assistant District Supply Officer to enquire. This officer made an enquiry and submitted a report in which he stated that he found no specific case against the accused and he also at another stage of his report said: "As for the specific complaint, I do not find any convincing material" though he apparently found that there was some dissatisfaction with the shop-keeper accused on general grounds. Rule 130 (1), Defence of India Rules, provides that

"no Court or Tribunal shall take cognizance of any alleged contravention of these Rules or of any order made thereunder, except on a report in writing of the facts constituting such contravention, made by a public servant."

The learned Magistrate has stated:

"There appears to be no difficulty in taking cognizance of the offence within the meaning of R. 130, Defence of India Rules. The report of the Enquiring Officer have (sic) stated the facts constituting the alleged contravention and this only is what is wanted for the purpose. The Enquiring Officer's report is no doubt not in the nature of a complaint within the meaning of S. 4, Criminal P. C., but R. 130, Defence of India Rules does not require a complaint for the starting of the case."

I regret I cannot agree with the view taken by the learned Magistrate. The Enquiring Officer certainly mentioned that allegations had been made before him of certain facts which allegations, if true, would have disclosed an offence under the Defence of India Rules. A report of such allegations, however, is not a report of the facts constituting the offence. It is quite clear to my mind that in order to comply with R. 130, Defence of India Rules, it is necessary that some

public servant must make himself responsible for the *prima facie* existence of the facts which will constitute the offence. There is no such complaint in this case. The conviction and the sentence are, therefore, set aside and the petitioner is discharged from his bail. The fine, if paid, must be refunded.

V.B.

Conviction set aside.

[Case No. 41.]

A. I. R. (33) 1946 Patna 108

AGARWALA J.

Sarjoo Prasad—Petitioner

v.

Bidyanandan Singh—Opposite Party.

Criminal Revn. No. 682 of 1945, Decided on 2nd August 1945, from order of Sessions Judge, Patna, D/- 27th March 1945.

(a) Criminal P. C. (1898), S. 197—Burden of proof — Accused must show that he falls within any of categories mentioned in section.

Where a Station Master on the O. T. Railway was prosecuted for an offence:

Held that his prosecution cannot be quashed on the ground of want of sanction under S. 197, Criminal P. C. unless he shows that he falls within any of the categories mentioned in that section.

[P 108 C 2]

(b) Government of India Act (1935), S. 270—Offences committed after 1937 — Sanction not required.

No sanction is required under S. 270 for prosecution in respect of an offence committed after 1937.

[P 108 C 2]

N. K. Prasad No. I, Narsingh Prasad and Manzoor Alam—for Petitioner.

S. Safdar Imam, Tarkeshwar Nath and P. Jha—for Opposite Party.

Order. — The petitioner who is a Station Master on the O. T. Railway is being prosecuted in respect of an offence alleged to have been committed on 26th July 1944. He has moved this Court to have the proceedings quashed on the ground that his prosecution has not been sanctioned. He relies on S. 197, Criminal P. C., and S. 270, cl. (1), Government of India Act, 1935. Section 197 requires sanction only in the case of a person who is a Judge within the meaning of S. 19, Penal Code, or a Magistrate, or a public servant who is not removable from his office save by or with the sanction of the Local Government, or some higher authority. The petitioner has not shown that he falls within any of these categories. So far as S. 270, Government of India Act is concerned, that applies only in respect of acts done before the relevant date, which expression is defined in sub-s. 3. As Part III of this Act came into force in 1937, it is obvious that the section does not apply to offences committed in July 1944.

There is no substance in either of the contentions raised on behalf of the petitioner, and the rule is discharged.

V.B.

Petition dismissed.

[*Case No. 42.*]

A. I. R. (33) 1946 Patna 109

SINHA J.

Baijnath Mahto alias Baijnath Gope
Petitioner

v.

Emperor.

Criminal Revn. No. 316 of 1945, Decided on 18th April 1945, from order of Magistrate (with appellate powers), Monghyr, D/-30th December 1944.

Evidence Act (1872), S. 154 — Witness declared hostile by prosecution but procedure contemplated by S. 154 not followed — Defence can rely upon his evidence.

An entry by the trying Magistrate at the end of the deposition of a prosecution witness to the effect that the witness has been declared hostile, without following the procedure laid down in S. 154 has absolutely no significance in law, and the value of his testimony given in cross-examination cannot be done away with. The defence is perfectly entitled to rely upon that testimony : ('33) 20 A. I. R. 1933 Pat. 517, *Rel. on.* [P 109 C 2; P 110 C 1]

S. Safdar Imam and Murtaza Fazl Ali — for Petitioner.

Government Pleader — for the Crown.

Order. — This application is directed against the concurrent orders of the Courts below convicting the petitioner under S. 411, Penal Code and sentencing him to rigorous imprisonment for four months and to pay a fine of Rs. 50 and in default of payment of the fine to undergo further rigorous imprisonment for one month. The petitioner was arrested by the police on 26th March 1944, in connection with a dacoity case. The police searched his house, and recovered a woolen coat (Ex. 1), a fine dhoti (Ex. 2), a silk kurta (Ex. 3) and a silk shirt (Ex. 4). The dacoity case, referred to above, ended in a final report, after investigation by the police; but the clothes aforesaid recovered from the house of the petitioner were utilised by the police for prosecution of the petitioner in connection with a burglary said to have taken place in the house of one Siris Prasad of Maheshpur on 27th February 1944. A number of witnesses were examined on behalf of the prosecution to identify these clothes as the property of Siris Prasad or of some members of his family. P. W. 6 was examined as one of the witnesses to the search. In his examination-in-chief, he deposed to the search having been made in his presence and the clothes recovered from the house of the accused. In his cross-exa-

mination on behalf of the accused, he admitted that clothes similar to those which were the subject-matter of the charge were seen being worn by the accused on occasions earlier than the time of the alleged burglary case itself. He also admitted that the prosecution witnesses who had come to Court as identifying witnesses were present at the thana. He made certain other admissions, tending to support the defence of the accused. After his deposition has been finished and signed by the learned Magistrate, there is a note "declared hostile" and then signed by the learned Magistrate. I am not aware of any procedure contemplated either by the Code of Criminal Procedure or by the Evidence Act which justifies the Magistrate recording the evidence just to make a note to that effect. Section 154, Evidence Act gives the discretion to the Court to permit the party calling a witness to put questions to that witness by way of cross-examination. That, in popular language, is described as declaring a witness as hostile. It must be presumed that the learned Magistrate was aware of the provisions of S. 154, Evidence Act. If he was, he should have permitted the prosecution to cross-examine P. W. 6 to show that he was giving false statements in his cross-examination in order to help the accused for any particular reasons of his own or that the statements made by him as to what happened at the thana were not true. But no such attempt was made by the prosecution, and, therefore, the entry at the end of the deposition to the effect that the witness had been declared hostile has absolutely no significance in law. If a party calling a witness wants to challenge his veracity or to get certain admissions detracting from the value of his evidence given beforehand, the procedure contemplated in S. 154 has to be resorted to. Hence, in this case simply because a witness has been declared hostile by the prosecution does not amount to saying that the value of his testimony given in cross examination has been done away with. This was laid down by a Division Bench of this Court in 14 P. L. T. 494.¹ That case is also an authority for the proposition that the evidence given by a witness who has been declared hostile is not to be brushed aside, but has to be considered for what it is worth. The Courts below seem to be under the impression that because the prosecution got it noted in the deposition sheet that the wit-

1. ('33) 20 A. I. R. 1933 Pat. 517 : 146 I. C. 993; 14 P. L. T. 494, *Emperor v. Haradhan.*

ness was declared hostile they had done all that was necessary to get rid of the effect of that evidence. That is not the legal position. The defence is perfectly entitled to rely upon that testimony in corroboration of the other evidence adduced by the accused himself in support of his defence to the effect that these clothes were his personal property, which he was seen wearing on different occasions publicly and on dates anterior to the date of the alleged burglary.

Another very curious feature of the judgment of the lower appellate Court is that it has omitted to consider the value of the evidence of three defence witnesses who, in my opinion, give very relevant evidence in this case. D. W. 1 is a tailor who deposes to having made these clothes to the order of the accused three years before his deposition, that is to say, sometime in the year 1941. Nothing very damaging to the witness had been elicited in the cross-examination. D. Ws. 2 and 3 have come forward to testify to the fact that they had seen the accused putting on these clothes on different occasions. Witness 2 puts it about three years before. The testimony of these three witnesses, if believed, entirely demolishes the prosecution case. Hence, it cannot be said that the lower appellate Court could have discarded the evidence; if it was cognizant of the fact that there was such evidence on the record, because it thought that that evidence was wholly irrelevant to the matter before the Court.

The evidence led on behalf of the accused summarized above, corroborated as it is by the evidence of P. W. 6 aforesaid, creates a very serious doubt in the mind of the Court as to whether the prosecution witnesses are telling the truth. In my opinion, the accused petitioner is entitled to the benefit of that doubt. Giving him that benefit, I set aside the orders of the Courts below and acquit him, and it is directed that he be released from his bail bond, and the fine, if paid, be refunded to him. The rule is accordingly made absolute.

V.B.

Rule made absolute.

[Case No. 43.]

A. I. R. (33) 1946 Patna 110**FULL BENCH****AGARWALA, MEREDITH AND RAY JJ.***Dandapani Gowda — Appellant*

v.

Bishun Das — Respondent.

Second Appeal No. 3 of 1941 (Cuttuck), Decided on 21st December 1945, referred to Full Bench by Sinha and Das JJ., D/- 12th March 1945.

(a) Orissa Money-Lenders Act (3 [III] of 1939), Ch. 3, Ss. 10 to 15 and S. 16 — S. 10 applies to suits only — S. 16 does not make S. 10 applicable to execution proceedings — Object of S. 16 and its effect on Ss. 10 to 15 explained (Per Full Bench).

Section 10 applies to suits only and not to execution proceedings. Section 16 does not have the effect of making S. 10 applicable to execution proceedings. The executing Court therefore has no power under S. 10 to scale down a decree already passed by restricting the amount of interest for the period prior to the institution of the suit to a sum equal to the amount of the principal debt.

[P 115 C 2]

The object of S. 16 was not to widen the scope of Ss. 10 to 15 beyond what is to be gathered from the language of those sections when read independently of S. 16 and to permit the executing Court to ignore the distinction made between mortgage and other loans and between suits and execution proceedings which is contained in the other sections of Ch. 3. Section 16 was enacted only for the purpose of showing to what extent Ss. 10 to 15 were intended to be retrospective. The effect of S. 16 on Ss. 10 to 15 is as follows:

[P 116 C 2]

(1) In respect of a loan advanced before the commencement of the Act the appropriate provision of Ss. 10, 11, or 12 according to whether the loan was by way of mortgage or otherwise, is to be applied even in a suit pending on the date on which the relevant section was directed to come into force.

[P 116 C 2]

(2) In respect of all loans the provisions of Ss. 13, 14 and 15 are to be applied in a proceeding to execute a decree passed on or after 1st April 1936, even though the proceeding was pending on the date on which the relevant section was directed to come into force.

[P 116 C 2; P 117 C 1]

(3) In the case of appeals (i) from a decree, the appellate Court has the same power and is subject to the same restrictions as the Court which passed the decree so far as the provisions of Ss. 10, 11 (1) and 12 are concerned. (ii) In execution cases the appellate Court has the same powers as the executing Court so far as Ss. 13 to 15 are concerned : ('42) 29 A.I.R. 1942 Pat. 431, *Affirmed*.

[P 117 C 1]

(b) Civil P. C. (1908), S. 100—Orissa Money-Lenders Act (3 [III] of 1939), Ss. 2, 10 and 16—Finding that person is money-lender is one of fact (Per Sinha and Das JJ. in Order of Reference).

The finding that a person is a money-lender is essentially a question of fact and therefore binding on the Court in second appeal.

[P 111 C 2]

C. P. C. —

('44) Chitaley, S. 100 N. 28, Pt. 3; N. 52;

(c) Interpretation of Statutes—Grammatical and ordinary sense of words is to be adhered to unless it leads to absurdity or repugnance (Per Sinha and Das JJ. in Order of Reference).

The universal rule in construing statutes is that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the enactment in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further: (1913) 1913 A.C. 107 and (1857) 6 H. L. C. 61, *Rel. on*. [P 114 C 1]

C. P. C. —

('44) Chitaley, Preamble N. 7 Pt. 5.

('41) Mulla, Page 2, Pt. (b).

(d) Orissa Money-Lenders Act, (3 [III] of 1939), S. 16—Marginal note cannot be referred to in interpreting S. 16 (Per *Sinha and Das JJ.* in *Order of Reference*).

The marginal note to S. 16 cannot be referred to for the purpose of construing S. 16: 26 All. 393 (P.C.); ('19) 6 A.I.R. 1919 Mad. 514 and ('37) 24 A. I. R. 1937 Bom. 198, *Rel. on*; ('29) 16 A.I.R. 1929 All. 53 (F.B.), *Expl.* [P 114 C 1]

C. P. C. —

('44) Chitaley, Preamble N. 11, Pts. 1 and 2.

('41) Mulla, Page 3, Pt. (p).

K. D. Chatterji — for Appellant.

P. Misra — for Respondent.

ORDER OF REFERENCE

Sinha and Das JJ. — This is a decree-holder's second appeal from the decision of the learned Additional Subordinate Judge of Berhampur, reversing that of the District Munsif of the same place in execution proceedings. The facts leading up to this appeal are as follows. The respondent executed a mortgage bond in 1910 in favour of one Chaitana Goudo. Original Suit No. 9 of 1922 was instituted by the mortgagee's sons. The Madras High Court passed a preliminary decree in the suit on 4th April 1933, and on 31st January 1939, the final decree was drawn up. Execution was taken out of this decree by the assignee of the decree from the original decree-holders. In that execution case the judgment-debtor made an application under S. 10, Orissa Money-Lenders Act (Orissa Act 3 [III] of 1939) for scaling down the decree. This objection of the judgment-debtor was numbered as Miscellaneous Judicial Case No. 16 of 1940. The opposite party to that case (the assignee of the decree-holders) contended in the Court of first instance that the original mortgagee-decree-holder was not a money-lender within the meaning of the Act, and that, therefore, S. 10 of the Act could not apply. It does not appear to have been contended in the first Court that S. 10 read with S. 16 of the Act did not apply to the case. The executing Court took the view that S. 10 read with S. 16, Money-Lenders Act was applicable to the case, provided that it was proved that the original mortgagee decree-holder was a money-lender. And, on taking evidence, it came to the conclusion that the original mortgagee-decree-holder was not a money-lender as defined in the Act, and, in that view of the case, dismissed the judgment-debtor's application.

On an appeal by the judgment-debtor, the lower appellate Court came to the conclusion that the judgment-debtor was entitled to

relief under S. 10 read with S. 16 of the Act in the view it took of the evidence that the mortgagee-decree-holder was a money-lender. Thus, on the only question of fact in controversy between the parties, the lower appellate Court reversed the decision of the trial Court. In the result, the lower appellate Court directed that the decretal amount should be reduced to double the principal sum advanced with interest for the period subsequent to the institution of the suit, as also cost. Hence, this second appeal by the decree-holder.

It was contended, in the first instance, by Mr. Chatterji appearing for the appellant that the finding of the lower appellate Court that the original mortgagee-decree-holder was a money-lender is not correct. But this finding, is essentially one of fact, and is, therefore, binding on this Court in second appeal. It must, therefore, be held that the judgment of the lower appellate Court cannot be assailed on the ground that the finding is incorrect.

But it was next contended that the relief granted by the lower appellate Court was not available to the judgment-debtor in execution proceedings, and, naturally, reliance was placed on a decision of a Division Bench of this Court in 8 Cut. L. T. 49.¹ In that case it was laid down by a Division Bench of this Court that S. 10 read by itself must be held to apply to suits only. We respectfully agree with that observation. But it has been further laid down that that section read with S. 16, Orissa Money-Lenders Act is not applicable to execution proceedings. With the utmost deference to the opinion of their Lordships who constituted the Bench, we are inclined to the opinion that that decision is not correct. Hence, it becomes necessary to examine in some detail the *ratio decidendi* of the decision aforesaid. Section 10, Orissa Money-Lenders Act, runs as follows :

"(1) Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced.

(2) Where, in any suit, as is referred to in sub-s. (1), it is found that the amount already realised as interest through Court or otherwise, for the

1. ('42) 29 A.I.R. 1942 Pat. 431 : 202 I. C. 615: 8 Cut. L. T. 49, Basudeb Mahapatra v. Surendra Nath Mitra.

period preceding the institution of the suit, is greater than the amount of the loan originally advanced, so much of the said amount of interest as is in excess of the loan shall be appropriated towards the satisfaction of the loan and the Court shall pass a decree for the payment of the balance of the loan, if any."

In terms that section is limited in its application to that stage in the litigation which has not yet resulted in a decree. By virtue of Notification No. 2316D, published in the Orissa Gazette of 28th June 1939 ss. 10 and 16 (so far as S. 16 applies ss. 10, 11, 12 and 13 to pending suits, appeals and execution proceedings mentioned therein) were to come into force on 1st July 1939. As the final decree in the present case was passed on 31st January 1939, S. 10 by its own force cannot apply to the present case, and the judgment debtor, therefore, will not be entitled to any relief under S. 10 of the Act. But S. 16 provides as follows:

"The provisions of Ss. 10 to 15 shall apply (i) to suits brought by money-lenders in respect of loans advanced before the commencement of this Act, and pending on the date on which the said sections came into force; and (ii) to appeals and proceedings in execution arising in respect of decree passed on 1st April 1936 or thereafter on the basis of loans whether such appeals or proceedings in execution were pending on, or instituted after, the date on which the said sections came into force."

By virtue of cl. (ii) of S. 16, the provisions of S. 10 have been made applicable to proceedings in execution arising in respect of decrees passed on 1st April 1936 or thereafter, either then pending or instituted after that date. As this section came into force on 1st July 1939, the judgment-debtor, on the face of the section, is entitled to relief unless it can be held, as has been held in the decision of the Division Bench of this Court aforesaid, that S. 10 has not been made applicable to execution proceedings by virtue of the provisions of S. 16. Reliance was placed on behalf of the respondent on another Division Bench decision of this Court in 8 Cut. L. T. 20² in which the following observations have been made by Harries C. J. and Manohar Lall J.:

"It is to be observed that in the present case the decree had been passed long before the Orissa Money-Lenders Act came into force but S. 10 is made applicable to this case by reason of S. 16 of the Act. In any event this section can only apply in a suit brought by a money-lender."

In that case their Lordships took the view that the lower Court was right in its conclusion that it had not been proved that the decree-holders were money-lenders within the meaning of the Orissa Money-Lenders Act. It was said on behalf of the appellant

that the observations of their Lordships quoted above are mere *obiter dicta*, inasmuch as they decided the appeal on the footing that the decree-holders in that case had not been proved to be money-lenders. But it has been rightly contended on behalf of the respondent that that decision itself would not have been necessary unless their Lordships were of the opinion that the Money-Lenders Act applied. Be that as it may, their Lordships did not discuss the question in controversy in the present case at all. They practically assumed that S. 10 of the Act had been made applicable to execution proceedings by virtue of S. 16. Hence, in our opinion, that decision cannot be cited as a considered opinion of that Bench. As the report itself shows, their considered opinion was given on the other question, namely, as to what is understood by the term "money-lender" in the Act. The appellant, on the other hand, relied upon a decision of a Bench of this Court consisting of Varma and Imam JJ. in Misc. First Appeal No. 10 of 1940,³ decided on 14th September 1944 in which that Bench followed the earlier decision of this Court in 8 Cut. L. T. 49¹ already referred to.

Their Lordships in this case also have not discussed the question independently, but have only followed the earlier decision of this Court. Hence, it must be held that the only considered judgment of this Court on the question in controversy between the parties brought to our notice is that reported in 8 Cut. L. T. 49.¹ In that case their Lordships have pointed out that the distinction between a suit and an execution proceeding has been carefully observed in Chap. III, Orissa Money-Lenders Act. In that chapter ss. 8 to 12 in express terms are confined to a suit by a money-lender up to the stage of passing of the decree, except that sub-s. (2) of S. 11 contemplates a proceeding by the judgment-debtor even after the passing of the decree and before execution is taken out, though it may be even after the decree has been put into execution. Similarly, S. 13 also may apply in both stages (i) after the passing of the decree and before execution is taken out, and (ii) after the decree has been put in execution. This is made clear by the expression "at any time" occurring in the section. It has been observed by their Lordships in the decision aforesaid that, if S. 16 were to be construed in the

2. (42) 29 A.I.R. 1942 Pat. 384 : 200 I. C. 284 : 8 Cut. L. T. 20, Sano Kashinath v. Pattito Sabuto.

3. Misc. First Appeal No. 10 of 1940, decided on 14th September 1944, Thangudu Lingaraju Patro v. Balunki Mohapatra.

manner suggested on behalf of the judgment-debtor, sub-s. (2) of S. 11 would appear to be redundant. But, with all respect to their Lordships, that sub-section is not necessarily confined to the stage of execution proceedings. On a plain reading of sub-s. (2) of S. 11 if a decree passed by a Court on 1st April 1936, or thereafter, on the basis of a loan, has not already been satisfied in whole or in part, it is open to the judgment-debtor to apply to the Court which passed the decree, even though the decree-holder has not started any execution proceeding, inviting it to exercise all or any of its powers given to it by sub-s. (1) of S. 11, that is to say, the Act empowers the Court to review a decree passed on or after 1st April 1936, to which the Act applies, by way of taking accounts between the parties, re-opening the account or relieving the judgment-debtor from the liability of paying any interest in excess of nine per cent. or twelve per cent. per annum as the case may be. Such a relief may also be claimed by the judgment-debtor even after execution proceedings have been started. Hence, it would appear that the provisions of sub-s. (2) of S. 11, not being confined only to the execution stage, are not redundant even if S. 16 were to be read along with S. 11. It is certainly "difficult to understand why a similar provision was not made in S. 10." We also respectfully agree with the observations of their Lordships in that case with reference to the terms of Ss. 14 and 15, Orissa Money-Lenders Act. The provisions of these two sections apply in their terms to execution proceedings only, whereas S. 13 may apply before execution is taken out. There may, therefore, be some sense in saying that S. 13 will apply to execution proceedings, but it is a little difficult to understand why the Legislature in S. 16 repeated that the provisions of Ss. 14 and 15 shall apply to execution proceedings or, to put it in another way, how these sections could be made applicable to suits before any decree was passed.

It must, therefore, be said that S. 16 has been rather loosely worded. But it is quite a different thing to say that, though the section makes S. 10 applicable to proceedings in execution arising in respect of decrees passed on or after 1st April 1936 the Court was in a position to hold to the contrary. In our opinion, the provisions of Section 16 read with the other provisions of Chap. III of the Act make it absolutely clear that, in a suit between a money-lender and the borrower resulting in a decree

passed on 1st April 1936, or after that date, it is open to the Court to apply the rule of "damdupat"—thus to describe compendiously the provisions of S. 10 of the Act—to re-open the accounts between the parties, even though those accounts may purport to have been closed by the decree; or to reduce the decretal sum by reducing the amount of interest in excess of nine per cent. in the case of secured debts and of twelve per cent. in the case of unsecured debts; or to grant instalments in which the decree may be paid by the judgment-debtor. All these are indications of the intention of the Legislature to grant concessions to borrowers or to judgment-debtors who may have been harshly treated by money-lenders. Similarly, the Legislature was intent upon making it clear that in such suits the aforesaid reliefs could be granted at the stage of appeal from decree passed, or even at the stage when execution had been taken out by the decree-holder, or perhaps even at a stage after the passing of the decree and before taking out of execution of that decree. In its endeavour to make that intention clear, the Legislature has grouped together all those sections, thus leading to those difficulties of interpretation which have been pointed out in the judgment aforesaid. But, in spite of those difficulties of interpretation, in our opinion, to the question whether the Legislature intended to apply the provisions of S. 10 to execution proceedings in respect of decrees passed on or after 1st April 1936, there is only one answer, and that is in the affirmative.

Apart, however, from the question of the "intention of the Legislature," which expression has been characterised by Lord Watson as a

"common but very slippery phrase signifying anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant : see 1897 A. C. 22⁴ at p. 38"

the express words used in S. 16 are that

"the provisions of Ss. 10 and 15 shall apply to proceedings in execution arising in respect of decrees passed on 1st April 1936, etc."

Quoting Lord Wensleydale, Lord Macnaghten has observed in 1913 A. C. 107⁵ at p. 117 that the universal rule in construing statutes, as in construing all other written instruments, is that

4. (1897) 1897 A. C. 22 : 66 L.J.Ch. 35 : 75 L. T. 426 : 45 W. R. 193, *Salomon v. Salomon & Co. Ltd.*

5. (1913) 1913 A.C. 107 : 82 L. J. K. B. 232 : 107 L. T. 722, *Vacher & Sons, Limited v. London Society of Compositors.*

"the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, *but no further* : (1857) H.L.C. 61⁶ at p. 106."

The only absurdity or inconsistency which has been pointed out is as respects the application of ss. 14 and 15 to suits, i. e., at a stage before the passing of the decree. There is no absurdity or inconsistency in applying S. 10 to execution proceedings : the section by itself applies to suits, but the Legislature can say, as it has said in clear terms, that it shall apply to certain execution proceedings. No inconsistency or absurdity follows from such application. On the contrary, it advances the general object of the Orissa Money-Lenders Act, the object being to "lessen the burden of debtors generally in respect of loans from money-lenders" : see 9 Cut. L.T. 42.⁷ It would be rather difficult to understand the meaning of Notification No. 2316-D, dated 28th June 1939, in so far as it brought S. 16 in force, if that section did not make ss. 10, 11, 12 and 13 applicable to execution proceedings. In our view, there are no good grounds why effect should not be given to the express words used in S. 16, and why the literal construction should be modified beyond the purpose of avoiding an absurdity, inconsistency or repugnance. The marginal note to S. 16 has been referred to as giving the clue to the proper interpretation of this section. In this connection reference may be made to the decision of their Lordships of the Judicial Committee of the Privy Council in 26 ALL. 393=31 I.A. 132.⁸ Lord Macnaghten, delivering the opinion of their Lordships, has observed as follows :

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

In this connection reference may also be made to the cases in 51 I. C. 46⁹ at p. 47 and I. L. R. (1937) Bom. 293=A. I. R. 1937 Bom.

6. (1857) 6 H.L.C. 61 : 26 L.J.Ch. 473 : 5 W. R. 454, Grey v. Pearson.

7. ('43) 30 A. I. R. 1943 Pat. 430 : 211 I. C. 8 : 9 Cut. L. T. 42, Govind Dani v. Purusotam Mahapatra.

8. ('04) 26 All. 393 : 7 O.C. 248 : 31 I. A. 132 : 8 Sar. 639 (P.C.), Balraj Kunwar v. Jagatpal Singh.

9. ('19) 6 A. I. R. 1919 Mad. 514 : 42 Mad. 451 : 51 I.C. 46, Kesava Chetty v. Secy. of State.

198.¹⁰ Counsel for the appellant drew our attention to the decision of a Full Bench of the Allahabad High Court in 51 ALL. 411¹¹ where their Lordships are reported to have observed, while construing the Agra Pre-emption Act of 1932, that marginal notes to sections of an Act can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to by, the Legislature. The observations in the last mentioned case may be correct with reference to the procedure followed in that particular legislation. Even assuming that the marginal note to S. 16 can properly be looked at for the correct interpretation of that section, we cannot find anything in the marginal note to lead us to the conclusion that S. 10 was not made applicable to execution proceedings by virtue of S. 16. On the other hand, if effect were to be given to the words of the marginal note, S. 10 is said to apply to execution proceedings. There are no indications in the marginal note to the contrary. The marginal note is not by itself complete; it refers to "certain pending suits, appeals and execution proceedings." At least, two of the provisions, S. 11 (2) and S. 13, may apply to a stage when the suit has ended in a decree but before execution has been taken out. There is no reference to that stage in the marginal note, and it cannot be said that the omission of that stage in the marginal note would make those two sections inapplicable in that stage. The word "certain" in the marginal note may have reference to the retrospective character of the section, but it does not and cannot take away the effect of the express words used in the section. Hence, it cannot be said that the marginal note shows that S. 10 was not meant to apply to execution proceedings. In the present case, if the words used by the statute in S. 16 have to be given their ordinary meaning, it must be held that S. 16 intended to extend the provisions of S. 10 to execution proceedings also. Hence, in our opinion, the correctness of the decision in 8 Cut. L. T. 49¹ is open to considerable doubt, and the decision requires re-consideration. We would, therefore, under R. 2 of Chap. V, High Court Rules, refer the following question for the decision of a Full Bench : "Do the provisions of S. 10 read with S. 16 (2), Orissa

10. ('37) 24 A.I.R. 1937 Bom. 198 : I.L.R. (1937) Bom. 293 : 169 I. C. 381, Dharwar Urban Bank, Ltd. v. Krishnarao Anantrao.

11. ('29) 16 A. I. R. 1929 All. 53 : 51 All. 411 : 113 I. C. 442 (F.B.), Ram Saran Das v. Bhagwat Prasad.

Money-Lenders Act (Orissa Act 3 [III] of 1939) empower the executing Court to scale down a decree already passed?" As this question arises in a second appeal, the appeal itself has to be referred to the Full Bench for decision.

Judgment of the Full Bench.

Agarwala J — This appeal arises out of an application by a judgment-debtor to have his liability for interest for the period preceding the institution of the suit limited to the principal amount of the loan under S. 10, Orissa Money-Lenders Act. The respondent obtained a decree on the mortgage which was made final on 31st January 1939. The appellant is an assignee of this decree. The application out of which this appeal arises was made to the Court executing the decree. Section 10 prohibits a Court in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of the Act from passing a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest, is greater than the amount of the loan originally advanced. Section 16 applies the provisions of Ss. 10 to 15 to proceedings in execution arising in respect of decrees passed on or after 1st April 1936 on the basis of loans, whether such proceedings were pending on or instituted after the date on which Ss. 10 to 15 came into force. The first Court held that the mortgagee in this case was not a money-lender within the meaning of the Act and accordingly dismissed the application of the judgment-debtor. On appeal by the latter, the Subordinate Judge held that the mortgagee was a money-lender and, purporting to act under S. 16 of the Act, allowed the application of the judgment-debtor by restricting the amount of interest for the period prior to the institution of the suit to a sum equal to the amount of the principal debt. Against that decision the decree-holder assignee preferred an appeal to this Court. The learned Judges before whom the appeal came were of the opinion that S. 16 had been rightly applied to the facts of the case; but as there is a previous decision of a Division Bench of the Court in 8 Cut. L. T. 49=A. I. R. 1942 Pat. 431¹ they referred to this Bench under R. 2 of Chap. 5 of the High Court Rules the following question:

"Do the provisions of S. 10 read with S. 16 (2), Orissa Money-Lenders Act, (Orissa Act 3 [III] of 1939) empower the executing Court to scale down a decree already passed?"

This question having arisen in a second ap-

peal, the appeal itself was also referred to this Bench. The preamble to the Act declares its object to be to regulate money-lending transactions and to grant relief to debtors in the Province of Orissa. None of the provisions of the Act come into force until the Governor has, by notification, directed them to do so under S. 1 (3). Sections 10, 11, 12, 13 and S. 16, in so far as it applies these sections to pending suits, appeals and execution proceedings, were directed to come into force by Notification No. 2316D dated 28th June 1939, which was published in the Orissa Gazette on 30th June 1939. Sections 14 and 15, and also S. 16, except in so far as it applies Ss. 10, 11, 12 and 13 to pending suits, appeals and execution proceedings, were directed to come into force by Notification No. 3930, dated 17th November 1939, which was published in the Orissa Gazette on 24th November 1939. All these sections fall within Chap. 3 which contains "provisions relating to suits in respect of loans and execution of decrees." Section 8, the first section of this Chapter, bars a suit on a loan advanced after the date on which the section comes into force unless the plaintiff had been registered as a money-lender under the Act at the time when the loan was advanced. Section 9 restricts the amount of interest which may be allowed on such a loan to 9 per cent. in the case of a secured loan and 12 per cent. in the case of an unsecured loan.

The material portion of S. 10 has already been cited. By its language, it applies to a suit and not to an execution proceeding. It prohibits a Court, in a suit by a money-lender, in respect of a loan advanced before or after the commencement of the Act, from passing a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced. Further provisions relating to the amount of interest recoverable by a money-lender in respect of a loan advanced before the commencement of the Act are contained in S. 11 (1) which empowers the Court in a suit on such a loan to reopen the transaction between the parties, take an account and relieve the debtor of all liability in respect of any interest in excess of 9 per cent. in the case of a secured loan and 12 per cent. in the case of an unsecured loan, and to appropriate the excess interest towards the satisfaction of the principal of the loan. By its language this sub-section restricts the

powers conferred in it to the Court trying the suit; but by sub-s. (2), in the case of a decree passed by a Court on or after 1st April 1936, and which remained unsatisfied in whole or in part on the date on which the Act came into force, the powers conferred by sub-s. (1) were declared to be exercisable either by the Court which passed the decree or by the Court to which the decree was sent for execution. In the case of a suit on a mortgage, the Court is enabled to grant further relief to the debtor by S. 12 which empowers it in such a case to direct payment of the debt by instalments. The provisions of Ss. 8 to 12 are ex-facie applicable to a suit and not to an appeal from the decree passed in the suit or to proceedings taken in execution of the decree except that the powers conferred by S. 11 are exercisable after the decree has been passed either by the Court which passed the decree or by the Court to which it has been sent for execution. Then follow three sections containing provisions exercisable by the Court executing a decree in a suit on a loan. Section 18 empowers the executing Court to direct payment of the decree by instalments in the case of a decree passed in a suit on loan, including a suit on a mortgage. Section 14 requires the Court executing a decree passed in a suit on loan to determine how much of the judgment debtor's property should suffice to satisfy the debt, and S. 15 directs that only so much of the property so determined shall be advertised for sale and that this portion shall not be sold for less than the decretal dues unless the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the value of the property specified in the sale proclamation. By themselves the application of these sections presents no difficulty. With regard to each it is clear which provisions of Chap. 3, apply to suits and which to execution proceedings and the special provisions relating to mortgage decrees and proceedings in execution of mortgage decrees are clearly distinguishable from the provisions relating to decrees made in suits for recovery on other loans. The difficulty which has led to this reference arises with respect to the provisions of S. 16 which are as follows:

"16. The provisions of Ss. 10 to 15 shall apply : (i) to suits brought by money-lenders in respect of loans advanced before the commencement of this Act, and pending on the date on which the said sections came into force; and (ii) to appeals and proceedings in execution arising in respect of decrees passed on 1st April 1936 or thereafter on

the basis of loans whether such appeals or proceedings in execution were pending on, or instituted after the date on which the said sections came into force."

It is contended that the effect of these provisions of S. 16 is to apply any or all of the provisions of Ss. 10 to 15 to all proceedings in respect of a loan, ignoring altogether the distinctions which have been made in these sections between mortgage and other loans and between suits and execution proceedings. It may be conceded that the section has not been happily worded. The learned Judges who made this reference were of opinion that the language of the section is ambiguous and taking into consideration that one of the objects of the Act is to grant relief to debtors, have held that the section should be so construed as to attain this object even though this construction entails disregarding the difference between mortgage and other loans and between suits and execution proceedings which mark the provisions of the other sections contained in Chap. III. That contention was advanced in 8 Cut.L.T. 49¹ which was heard by Fazl Ali J. (as he then was) and Varma J. in 1942, and was rejected. I agree with the reasons which led to the rejection of the contention on that occasion and I do not propose to enumerate them here. I agree also with the conclusion then reached that S. 16 was enacted only for the purpose of showing to what extent Ss. 10 to 15 were intended to be retrospective. None of the sections in question contain any provisions with regard to suits or execution proceedings, or appeals in suits or execution proceedings, instituted before any one of these sections had been brought into operation by a Notification of the Governor under S. 1 (3) of the Act. The object of S. 16 was to make it clear that the appropriate section is to apply to suits, execution proceedings and appeals in suits and execution proceedings, in the case of suits, execution proceedings and appeal pending at the time that the relevant section came into force. The effect of this section may be summarised as follows : (1) In respect of a loan advanced before the commencement of the Act the appropriate provision of Ss. 10, 11 or 12 according to whether the loan was by way of mortgage or otherwise, is to be applied even in a suit pending on the date on which the relevant section was directed to come into force. (2) In respect of all loans the provisions of Ss. 13, 14 and 15 are to be applied in a proceeding to execute a decree passed on or after 1st April 1936, even though the proceeding was pending on the date on which

the relevant section was directed to come into force. (3) In the case of appeals: (i) from a decree, the appellate Court has the same power and is subject to the same restrictions as the Court which passed the decree so far as the provisions of Ss. 10, 11 (1) and 12 are concerned; (ii) in execution cases, the appellate Court has the same powers as the executing Court so far as Ss. 13 to 15 are concerned.

In my opinion, it was not the intention of the Legislature in enacting S. 16 to permit the executing Court to disregard the distinction made between mortgage and other loans and between suits and execution proceedings which is contained in the other sections of Chap. III. I would accordingly allow the appeal and dismiss the application of the judgment-debtor. The appellant is entitled to his costs throughout.

Meredith J. — I agree.

Ray J. — I agree.

G.N.

Appeal allowed.

[*Case No. 44.*]

A. I. R. (33) 1946 Patna 117

BEEVOR J.

Swarath Sao — Petitioner

v.

Emperor.

Criminal Revn. No. 1126 of 1944, Decided on 14th Dec. 1944, from order of Addl. Dist. Magistrate, Santal Parganas at Dumka, D/- 4th August 1944.

Defence of India Rules (1939), R. 130—Mere allegation that accused was smuggling grain from Bihar to Bengal, held not sufficient to take cognizance of offence of keeping grains for sale without licence under Foodgrains Control Order.

Where a Court took cognizance on a charge-sheet which contained the only sentence "on 5-10-43 at 12-30 A.M. the accused persons were found smuggling maize from Bihar to Bengal:"

Held that this was not sufficient for the Court to take cognizance under R. 130, of the alleged offence of contravening the Foodgrains Control Order by being in possession of grains for the purpose of sale without licence. [P 118 C 1]

C. P. Sinha and Ramanand Sinha—

for Petitioner.

Government Advocate — for the Crown.

Order. — The petitioner has been convicted under R. 81 (4), Defence of India Rules for attempting to smuggle 187 bags of maize from Bihar to Bengal. He has been sentenced to rigorous imprisonment for four months and a fine of Rs. 200 or in default, three months' further rigorous imprisonment on that charge; and an order of forfeiture of the 187 bags of maize had been passed. He was also convicted under the same rule for contravening the Foodgrains Control

Order by being in possession of grains, namely the said 187 bags of maize, for the purpose of sale without a licence, but no separate sentence has been passed for this offence.

It is undisputed that 187 bags of maize belonging to the petitioner were found in a boat anchored at Nougachhia Diara on the north bank of the Ganges, and that the petitioner was on the boat. The prosecution examined a number of witnesses, but not one of the prosecution witnesses seems to have given any evidence to show that the petitioner intended to take these bags of maize to Bengal, except for one statement of the Assistant Sub-Inspector, P. W. 1, that he was told by the boatman that the maize was being taken to Bengal. This is hearsay evidence and inadmissible against the petitioner. The petitioner has, however, been convicted because in his evidence he alleged that the bags of maize in the boat were being taken from Bhagalpur on the west to Mangalhat on the east, both on the south bank of the Ganges, and it is in evidence that Nougachhia Diara is to the east of Mangalhat. The lower Courts have taken this to prove that the defence story was false. Now, it is well-known that owing to sand banks and such like it is frequently necessary, when navigating the Ganges, for a boat to proceed beyond the point at which it is seeking to reach. There is no evidence on the record to show how far east of Mangalhat lies the spot in Nougachhia Diara where the boat was anchored. There was one defence witness, who is a boatman, who gave evidence in support of this defence story, and no question was put to him suggesting that if the boat was going to Mangalhat it was unreasonable or unnecessary to anchor at Nougachhia Diara, and no explanation was asked from the petitioner himself when he was examined. In the circumstances it may be that the defence version was not adequately proved, but on the other hand, it cannot be said that it has been established that that story was false. I find, therefore, no evidence on which the conviction of the petitioner on the first charge can properly be based.

With regard to the second charge on which no separate sentence was passed, this charge was added by the trial Court at a late stage of the trial. Under R. 130, Defence of India Rules

"no Court or Tribunal shall take cognizance of any alleged contravention of these rules, except on a report in writing of the facts constituting such contravention, made by a public servant."

The Court took cognizance in this case on the charge-sheet. The only details are given in the sentence: "On 5-10-43 at 12-30 A.M. the accused persons were found smuggling maize from Bihar to Bengal." This contains no allegation that the petitioner was keeping grains for sale. Even the report of the Assistant Sub-Inspector to the Sub-Inspector of Police, which is Ex. 1, contains no such allegation. I find, therefore, that the Court could not legally take cognizance of the alleged offence of keeping grain for sale without a licence. The petition is, therefore, allowed. Both convictions and the sentence passed on the petitioner are set-aside, and so is the order of forfeiture. The petitioner will now be discharged from his bail. The fine, if paid, must be refunded.

V.B.

Revision allowed.

[Case No. 45.]

A. I. R. (33) 1946 Patna 118

FAZL ALI C. J.

Jung Bahadur Ahir and another— *Petitioners*

v.

Bansropan Singh and another— *Opposite Party.*

Civil Revn. No. 340 of 1944, Decided on 12th March 1945, from order of Small Cause Court Judge, Arrah, D/- 17th February 1944.

Stamp Act (1899), S. 35 — Insufficiently stamped promissory note is not admissible as acknowledgment of debt to save limitation.

Where a document which is primarily a promissory note is insufficiently stamped it is not admissible in evidence to prove an acknowledgment of liability in order to save limitation in respect of a promissory note previously executed : ('38) 25 A. I. R. 1938 Mad. 75 and 63 Cal. 813, *Rel. on*; 3 All. 581 (F.B.), *Expl.* [P 118 C 2]

Stamp Act —

('45) Chitale, S. 35, N. 8, Pt. 16.

('41) Mulla, Page, 103, 'Limitation.'

D. N. Varma — for Petitioners.

A. B. N. Sinha — for Opposite Party.

Order. — It appears that the opposite parties had executed a promissory note on 6th July 1937 in favour of the petitioners for a sum of Rs. 200. On 28th June 1940 they executed another promissory note for Rs. 272. In this promissory note reference was made to the principal and interest due under the earlier document and it was recited that as that document was about to be barred it was considered necessary that a second promissory note should be executed. On 26th June 1943 the petitioners brought the present suit in the Small Cause Court

to recover a sum of Rs. 369-14-6 alleging that the cause of action arose on the date of the execution of the second promissory note. This suit was dismissed on the ground that the first promissory note was time barred and the second promissory note was insufficiently stamped. The petitioners have now filed an application under S. 25, Provincial Small Cause Courts Act, praying that the judgment of the Court below be set aside and a decree passed in their favour against the opposite parties for the sum claimed in the suit. It was not disputed that the promissory note of 28th June 1940 is insufficiently stamped. It is, however, contended that though that document was not admissible as a promissory note, yet it was admissible as an acknowledgment of debt. The question, however, is whether the document can be admitted in evidence for that purpose in view of the provisions of S. 35, Stamp Act, which read as follows :

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped."

It was held in 21 Bom. 201¹ that an acknowledgment of a debt coming under Art. 1, Sch. 1, Stamp Act, 1 [I] of 1879, cannot be given in evidence for any purpose including the purpose of saving limitation. This case was followed by the Madras High Court in I. L. R. 1938 Mad. 210.² That was a case relating to a promissory note of a somewhat similar nature to the document with which I am concerned in this revision, and it was held that an improperly stamped promissory note is inadmissible in evidence to prove an acknowledgment of liability in order to save limitation in respect of promissory notes previously executed. The learned Chief Justice of the Madras High Court who delivered the judgment in that case pointed out that on the wording of S. 35, Stamp Act, an improperly stamped promissory note cannot be admitted in evidence for the purpose of saving limitation or for any other purpose. A similar view was recently expressed by the Calcutta High Court in 63 Cal. 813.³ Mr. Varma, who appears for the petitioner, has relied upon the Full Bench

1. ('97) 21 Bom. 201 (F.B.), *Mulji Lala v. Lingu Makaji.*

2. ('38) 25 A. I. R. 1938 Mad. 75 : I. L. R. (1938) Mad. 210 : 175 I. C. 24, *Nageshwara Rao v. Narayanamurti.*

3. ('36) 63 Cal. 813, *Jogendra Chandra Banerji v. Shacheendra Kumar.*

decision of the Allahabad High Court in 3 ALL. 581;⁴ but it was pointed out in the case decided by the Calcutta High Court to which reference has been made that the document in question in the case before the Full Bench was executed while the Stamp Act of 1869 was in force and the terms of the relevant section in that Act were different from the provisions of S. 35 of the present Act, the words "for any purpose" being first introduced in the Stamp Act of 1879. The view which seems to prevail in the Allahabad High Court is clearly set forth in 166 I. C. 919,⁵ in which Sulaiman, C. J. and Bennet, J. held as follows :

"The Court should consider whether the document is primarily a promissory note which is insufficiently stamped though incidentally it may amount to a receipt or an acknowledgment of liability. In such a case the stamp must have been affixed to it as a promissory note and not as a mere acknowledgment of liability. Where the instrument as a whole is insufficiently stamped it would not be proper to allow it to be split up into two portions and to regard the duty paid on it as having been paid on the portion which it suits the plaintiff to retain although the primary purpose of the document was contained in the other portion."

In the present case the document of 28th June 1940 purports to be a promissory note and must be treated as such. The plaint clearly states that the cause of action for the suit arose on the day on which this document was executed and that shows that the suit was based upon this document. As the document was insufficiently stamped the learned Small Cause Court Judge was right in holding that it could not be admitted in evidence under S. 35, Stamp Act. The application is accordingly dismissed, but there will be no order for costs.

D.S./D.H. *Application dismissed.*

4. ('81) 3 All. 581 (F. B.), Kanhaya Lal v. Stowell.

5. ('37) 24 A. I. R. 1937 All. 101 : 166 I. C. 919, Mt. Bibbo v. Gokaran Singh.

[Case No. 46.]

A. I. R. (33) 1946 Patna 119

VARMA AND SHEARER JJ.

Ahmad Hussain — Petitioner
v.

Emperor.

Criminal Revn. No. 169 of 1945, Decided on 12th April 1945, from order of Sessions Judge, Patna, D/- 22nd January 1945.

Motor Spirit Rationing Order (1941), R. 22 — "Acquire" meaning of — Elements bringing a person within mischief of rule held proved.

The petitioner was seen at 10 o'clock in the night towards the back side window of a garage trying to move away with two tins of petrol and to

escape when caught. He was convicted under R. 81 (4), Defence of India Rules, for having contravened R. 22, Motor Spirit Rationing Order. The finding of the lower appellate Court was as follows ; "It appears from the evidence that the appellant was trying to extricate himself from the hold. The appellant has not been able to show that he was in lawful possession of the petrol. His defence that it was really Ram Naresh Singh who had the petrol and had asked him to carry it for him has not been shown to be true."

Held that the word "acquire" used in the rule means "gain to oneself and for oneself; win; come into possession of"; that though the word "acquire" did not find place in the above finding there was no doubt about the meaning of the finding; that on the facts found the elements which would bring the petitioner within the mischief of the rule, namely, "acquiring a supply of motor spirit otherwise than in accordance with the provisions contained in this order," had been established and that the order of conviction had been rightly passed. [P 120 C 1]

H. R. Kazimi — for Petitioner.

Government Pleader — for the Crown.

Varma J.—The petitioner Ahmad Hussain, aged 22, whose occupation is that of cycle-repairing, has been convicted under R. 81 (4), Defence of India Rules, for having contravened R. 22, Motor Spirit Rationing Order, 1941, and has been sentenced to three months' rigorous imprisonment. The case for the prosecution is that on 29th April 1944, at 10 P.M., P. W. 5 Ram Naresh Singh, noticed the petitioner moving away from the back side window of garage No. 5 of the Patna Police Lines. Ram Naresh (P. W. 5) challenged him and eventually caught him with two tins of red petrol, which have been marked as Exs. I and II. On his hulla, Sheojatan Singh (P. W. 3) and Ram Newaj Singh (P. W. 2) turned up on the scene. They saw the petitioner trying to free himself from the grip of P. W. 5, and they also saw the two tins of petrol. They took the petitioner to the Inspector of Motor Vehicles (P. W. 6) who drew up a report, on the basis of which a first information report was drawn up, which is Exhibit 4 (1).

The case for the defence, which can be gathered from the written statement and the trend of the cross-examination as well as from the evidence of two defence witnesses, seems to be that it was Ram Naresh Singh who was taking away the two tins of petrol, when he met the present petitioner on the road and wanted him to carry the tins to a petrol shop of a certain individual. On his refusal the petitioner was assaulted with slaps and falsely implicated in this case. The Courts below have accepted the prosecution story and have not accepted the defence version. Mr. Kazimi, appearing on

behalf of the petitioner, has referred to the finding of the lower appellate Court and urged that that finding does not bring the petitioner within the mischief of R. 22, Motor Spirit Rationing Order, 1941. That rule says, "no person shall furnish or acquire a supply of motor spirit otherwise than in accordance with the provisions contained in this order." Now the finding to which reference has been made, is as follows :

"It appears from the evidence that the appellant was trying to extricate himself from the hold. The appellant has not been able to show that he was in lawful possession of the petrol. His defence that it was really Ram Naresh Singh who had the petrol and had asked him to carry it for him has not been shown to be true."

Mr. Kazimi argues that this finding is not enough to bring the petitioner within the wordings of R. 22, which speaks of

"furnishing or acquiring a supply of motor spirit otherwise than in accordance with the provisions contained in this order."

The learned advocate urges that simply because the petitioner was in possession of the petrol, it could not be said that the petitioner had acquired it against the provisions of the rule. The word "acquire", according to the Oxford Dictionary, means "gain to oneself and for oneself; win; come into possession of." It is true that the word "acquire" does not find place in the finding to which reference has been made. But there is no doubt about the meaning of the finding arrived at by the lower appellate Court. When a person is seen at 10 o'clock in the night towards the back side window of a garage trying to move away with two tins of petrol and to escape when caught, and when the explanation given by him is found to be false, I think the elements which would bring him within the mischief of R. 22, Motor Spirit Rationing Order, 1941, have been established. I need not refer to the fact that the defence set up and attempted to be substantiated by two defence witnesses has not been accepted. It is not likely that if Ram Naresh himself was moving away with the tins of petrol, he would like to have one additional witness to prove his action. I am of opinion that on the facts of this case the order of conviction has been rightly passed. I would, therefore, discharge the rule.

Shearer J. — I agree.

D.H.

Rule discharged.

[Case No. 47.]

A. I. R. (33) 1946 Patna 120

VARMA AND SHEARER JJ.

Dulhin Sunderbati Kuer — Appellant

v.

Sukhdeo Singh and another —

Respondents.

Appeal No. 1034 of 1945, Decided on 18th April 1945, from appellate decree of Addl. Dist. Judge, Muzaffarpur, D/- 18th June 1943.

(a) **Civil P. C. (1908), S. 100—Finding of fact.**

It is not open to the High Court sitting in second appeal to set aside a decision on a pure question of fact. [P 121 C 2]

C. P. C. —

(44) Chitaley, S. 100, N. 52 Pt. 4.

(41) Mulla, S. 100, Page 367 Pt. (g).

(b) **Limitation Act (1908), S. 21 (3)—Acknowledgment by Hindu widow binds reversioners.**

Under sub-s. (3) of S. 21 an acknowledgment, by a Hindu widow or her agent, of liability is binding against the reversioners. [P 121 C 2]

Limitation Act —

(42) Chitaley, S. 21, N. 19 Pt. 2.

(38) Rustomji, S. 19, Page 357 Pt. 1.

(c) **Hindu law — Widow — Whether Hindu widow can sell property to pay time-barred debt.**

Quære: Whether a Hindu widow, in order to pay a debt, is entitled to sell property even when a suit to recover the debt is barred by limitation : (37) 24 A. I. R. 1937 Pat. 40, *Doubted*. [P 122 C 1]

B. N. Rai and K. K. Sinha — for Appellant.

L. K. Jha, K. P. Upadhyay and Ram Pratap Singh — for Respondents.

Shearer J.—The appellant, Mt. Sunderbati Kuer, who was the plaintiff, is the youngest of the three daughters of Raghunandan Tewari, who is now dead, and Mt. Fekan Kuer, who was defendant 2 in the Court below. On 3rd October 1939, Mt. Fekan Kuer executed a sale-deed conveying 9 bighas 16 kathas 12 dhurs of land to Sukhdeo Singh, defendant 1. Sukhdeo Singh is one of three brothers, the other two of whom married the two elder daughters of Raghunandan Tewari and Mt. Fekan Kuer. The consideration for the sale-deed was Rs. 1000, and it contained a recital that from the time, between 1327 and 1346, Mt. Fekan Kuer had borrowed money for purposes of legal necessity from Sukhdeo Singh. The amount outstanding when the sale-deed was executed was Rs. 591-4-0, and the balance was taken partly in order to pay arrears of rent and partly in order to enable bullocks to be purchased and necessary repairs to the dwelling house of Mt. Fekan Kuer to be carried out. The plaintiff asserted that, in point of fact, her mother had never borrowed any money from Sukhdeo Singh and that the sale-deed and the chithas had been

brought into existence merely in order to enable her two elder sisters, or rather the joint family into which they had married, to obtain a larger share in the land of Raghunandan Tewari than they were entitled to under the ordinary rules of inheritance. The trial Court decreed the suit, but on appeal this decision was set aside and the suit was dismissed.

Mr. B. N. Rai, for the appellant, complains that the learned Additional District Judge did not consider or weigh as carefully as he should have done the reasoning by which the learned Subordinate Judge supported his decision. Mr. Rai refers to the observations of Fazl Ali, J. as he then was, in A. I. R. 1943 Pat. 177,¹ and suggests that either we ought to interfere with the finding of the lower appellate Court, or at all events, ought to order the appeal to be reheard. The observations of Fazl Ali J. were, however, based on the facts of the particular case with which he was then concerned. Moreover, it is not, I think, possible to say that the learned Additional District Judge did not consider the reasons which weighed with the trial Court in decreeing the suit. Mt. Fekan Kuer, being a *pardanashin* woman, the money which from time to time she borrowed from Sukhdeo Singh was sometimes sent to her through a messenger. The defendants put into the witness-box two men who were either servants or relations of Mt. Fekan Kuer and who said that money had been sent to her by Sukhdeo Singh through them. They also put into the witness-box two other men who claimed to have been present when Sukhdeo Singh had advanced certain sums of money. The learned pleader for the plaintiff cross-examined these men as to the amounts of money which had been paid to them and as to the dates on which they had in some cases signed the chithas for Mt. Fekan Kuer. The answers which they gave to these questions were wholly at variance with what was contained in the chithas, and the learned Subordinate Judge relying on what he thought were certain admissions made by them, came to the conclusion that the chithas had been brought into existence at or about the same time as the sale-deed.

The learned Additional District Judge considered this oral evidence, although he did not perhaps examine it in detail. So far as some at least, and perhaps most, of the admissions are concerned, the learned Addi-

tional District Judge was justified in not attaching much weight to them. One matter which weighed with him, and I again think rightly weighed with him, more than it did with the trial Court, was that the plaintiff had asserted that her elder sisters were married during the life time of their father and that this was definitely proved not to have been the case. As to the general probabilities and the circumstances of the case, the learned Additional District Judge considered them as fully and as carefully as the learned Subordinate Judge had done. The latter drew certain inference from them and the former drew quite other inferences. That, however, it was open to the learned Additional District Judge to do, and it is not open to this Court sitting in second appeal, to set aside his decision on a pure question of fact. It must, I think, for the purposes of this second appeal, be assumed that Mt. Fekan Kuer did from time to time borrow money from Sukhdeo Singh for purposes of legal necessity, and also that the entries in the chithas were made when they purport to have been made. Mr. B. N. Rai, for the appellant, then contended that Rs. 591-4-0 out of the consideration of the sale-deed was really made up of sums which had been borrowed by Mt. Fekan Kuer between 1327 and 1343 Fasli, and that suits to recover any of these amounts would, in 1939, when the sale-deed was executed, have been barred by limitation. So far, therefore, as this part of the consideration money is concerned it is, Mr. Rai argues, impossible to say that there was legal necessity for the sale.

The lower appellate Court seems to have assumed that this sum of Rs. 591-4-0 was the balance due on an account stated between Mt. Fekan Kuer on the one hand and Sukhdeo Singh on the other. The matter was not dealt with very fully or clearly by the learned Additional District Judge, but it is, I think, unlikely that this assumption was correct. It is, however, clear that the entries in the chitha made by Mt. Fekan Kuer or by other persons on her behalf amounted to acknowledgments that money was due by her to Sukhdeo Singh. Under sub-s. (3) of S. 21, Limitation Act, an acknowledgment by a Hindu widow or her agent of liability is binding against the reversioners. Mr. Rai conceded this but said that some of the acknowledgments contained in the chithas were not made within the period of limitation and were, therefore, not valid acknowledgments. The chithas are not, however, included in

1. (143) 30 A. I. R. 1943 Pat. 177 : 22 Pat. 154 : 206 I. C. 525, R. P. Ghosh v. B. & N. W. Ry. Co.

the paper-book. We did not think it necessary or proper to adjourn the hearing of the appeal in order that this omission might be rectified now. If any considerable proportion of the sum of Rs. 591-4-0 was not in fact barred by limitation when the sale-deed was executed, it would probably be a matter of some difficulty to say that the sale-deed is nevertheless liable to be set aside.

There is another difficulty in the way of the appellant, namely, that a Division Bench of this Court has decided that a Hindu widow is entitled not merely to acknowledge the existence of a debt, but in order to pay such a debt is also entitled to sell the property even when a suit to recover the debt is barred by limitation: 16 Pat. 45.² This decision was subjected to a good deal of criticism, and I must confess myself to some difficulty in appreciating the reasoning by which it is supported. It is well settled that a Hindu widow is in substantially the same position as the guardian of a minor. There are no doubt authorities that when the guardian of a minor pays a time-barred debt he is not necessarily liable to refund the money. But I find no authority for the proposition that when, in such a case the guardian alienates the property of the minor, the alienation is binding on the minor. If, on other grounds the plaintiff was entitled to succeed, I should, I think, have been disposed to suggest that the decision in 16 Pat. 45² required consideration by a larger Bench. That, however, is not the position here, and for the reasons just given I would dismiss this appeal with costs.

Varma J.—I agree.

V.R./D.H.

Appeal dismissed.

2. (37) 24 A.I.R. 1937 Pat. 40 : 16 Pat. 45 : 166 I.C. 555, Daroga Rai v. Basdeo Mahto.

[Case No. 48.]

A. I. R. (33) 1946 Patna 122
AGARWALA AND MEREDITH JJ.

Prahlad Rai and another
Petitioners

v.

Emperor.

Criminal Revn. No. 1130 of 1944, Decided on 15th November 1944, from order of Addl. District Magistrate, Santal Parganas, Dumka, D/- 26th August 1944.

(a) Criminal trial—Evidence — Prosecution, right of, to rely on evidence not led by them but coming on the record otherwise.

The prosecution are entitled to ask the Court to come to a finding of fact not only on evidence which they lead but on evidence which is otherwise brought on the record. [P 123 C 1]

The accused were convicted for contravening an order of the Sub-Divisional Magistrate made under R. 81 (2) (b), Defence of India Rules, prohibiting the sale of certain commodities above a certain rate. The prosecution offered no direct evidence of the method of publication, or of the method prescribed by the Sub-Divisional Magistrate for publication of his order as required by R. 119, Defence of India Rules :

Held that from the finding in the case that the accused issued a cash memo wrongly showing that the prices they had charged were the prices actually prescribed by the Sub-Divisional Magistrate it was clearly inferable that they not only knew that the Sub-Divisional Magistrate had made an order fixing the prices of various commodities at certain rates, but that knowledge of that order had been brought to the notice of the accused in the manner contemplated by the Sub-Divisional Magistrate. [P 123 C 1]

Cr. P. C. —

(41) Chitaley, S. 367, N. 6.

(b) Criminal P. C. (1898), S. 439—Revisional jurisdiction, exercise of—High Court's discretion.

Revisional jurisdiction is exercised at the discretion of the High Court, and only for the purpose of relieving persons who have not had a fair trial, or whose convictions have been arrived at by non-observance of material provisions of the law, or by such misdirections as must have occasioned a failure of justice. [P 123 C 1]

Where, therefore, the High Court is satisfied that the accused, who are convicted for contravening an order of a Sub-Divisional Magistrate, prohibiting the sale of certain commodities above a certain rate, knew what the controlled prices of the commodities were in which they were dealing, there is no justification whatsoever for interfering with the convictions on the ground of absence of proof that the order was published in the manner required by R. 119, Defence of India Rules. [P 123 C 1, 2]

Cr. P. C. —

(41) Chitaley, S. 439, N. 1, Pts. 3a and 5.

(41) Mitra, S. 439, Notes 1202 and 1203.

Baldeva Sahay and S. R. Ghosal —

for Petitioners.

Government Advocate — for the Crown.

Agarwala J. — The petitioner Prahlad Rai has been sentenced to nine months' rigorous imprisonment and to pay a fine of Rs. 1000, for contravening an order of the Sub-Divisional Magistrate of Rajmahal prohibiting the sale of certain commodities above a certain rate. The other petitioner, Nathmal Marwari is an employee of Prahlad Rai, and has been sentenced to three months' rigorous imprisonment and to pay a fine of Rs. 300 for the same offence.

In exercise of powers conferred by Rule 81 (2) (b), Defence of India Rules, the Sub-Divisional Officer, made an order prohibiting the sale of sugar at more than Rs. 15 a maund, flour at Rs. 8-14-0 a maund, white kerosene oil at Rs. 5-4-3 a tin and red kerosene oil at Rs. 4-13-6 a tin. It is alleged that

the petitioners sold four tins of kerosene oil at Rs. 8 a tin, flour at Rs. 13-8-0 a maund and sugar at Rs. 22-8-0 a maund. A cash memo was issued to the purchaser showing the prices charged to be those fixed by the Sub-Divisional Officer, although, in fact, the prices charged were as stated.

The only question that has been argued before us is that the conviction is wrong in the absence of proof that the order of the Sub-Divisional Officer was published in the manner required by R. 119, Defence of India Rules, that is to say, in the manner which the Sub-Divisional Officer considered to be best adapted for bringing his order to the notice of the persons to be affected by it. We have been referred to decisions of this Court and of other Courts on this question. The prosecution offered no direct evidence of the method of publication, or of the method prescribed by the Sub-Divisional Officer for publication of his order. But the prosecution are entitled to ask the Court to come to a finding of fact not only on evidence which they lead but on evidence which is otherwise brought on the record. The material finding in this case is that the petitioners issued a cash memo wrongly showing that the prices they had charged were the prices actually prescribed by the Sub-Divisional Officer. From that fact it is clearly inferable that the petitioners knew of the order made by the Sub-Divisional Magistrate, that is to say, that they not only knew that the Sub-Divisional Magistrate had made an order fixing the prices of the various commodities at the rates already referred to, but that knowledge of that order had been brought to the notice of the petitioners in the manner contemplated by the Sub-Divisional Officer. This circumstance, that the petitioners knew the controlled rate at which the articles should have been sold, distinguishes this case from the other cases which have been referred to. Furthermore, we are asked in this case to interfere with the convictions in the exercise of our revisional jurisdiction. That jurisdiction is exercised at our discretion, and only for the purpose of relieving persons who have not had a fair trial, or whose convictions have been arrived at by non-observance of material provisions of the law, or by such misdirections as must have occasioned a failure of justice. We are satisfied in this case that the petitioners actually knew what the controlled prices of the commodities were in which they were dealing, and, therefore, there is no justification whatsoever for in-

terfering with the convictions and sentences which have been passed on them. I would, accordingly discharge this rule.

Meredith J. — I agree.

The petitioners never challenged the fact of the publication at the trial, and the finding, which was, in my opinion, fully justified, was that they knew of the controlled rates and sold in deliberate contravention of them. There is not the slightest reason for holding that there has been any miscarriage of justice in this case, and, in my judgment, there is no ground at all for interference in revision.

V.R./D.H.

Rule discharged.

[Case No. 49.]

A. I. R. (33) 1946 Patna 123

DAS J.

Ganesh Potedar — Petitioner

v.

Emperor.

Criminal Revn. No. 314 of 1945, Decided on 3rd April 1945, from order of 3rd Addl. Sessions Judge, Bhagalpur, D/- 10th January 1945.

(a) Defence of India Rules (1939), Rr. 81 (4) and 119—Prosecution for selling kerosene at a price in excess of controlled price — Duty of prosecution to prove order fixing price and its due promulgation.

It is essential for a prosecution under R. 81 (4), Defence of India Rules, to prove that the competent authority had determined the manner in which a notice of the order was to be published and that the order had been so published before the alleged offence had been committed by the accused : ('45) 32 A.I.R. 1945 Pat. 307, *Rel. on.*

[P 124 C 1]

The accused was convicted of an offence under R. 81 (4), Defence of India Rules, for selling a tin of kerosene oil at a price in excess of the controlled rate. There was no evidence to show that the authority competent under R. 81, Defence of India Rules, had fixed the price of kerosene oil; nor was there any evidence to show that the order fixing the price of kerosene oil had been duly published as required by R. 119, Defence of India Rules :

Held that conviction of the accused under R. 81 (4), Defence of India Rules, could not stand.

[P 125 C 1]

(b) Evidence Act (1872), S. 74 — Order of competent authority fixing price under R. 81, Defence of India Rules, is public document.

It is well settled that the orders of the competent authority fixing the price of kerosene oil (under R. 81, Defence of India Rules), are public documents; they can be proved by the production of the original orders or by certified copies thereof : ('44) 31 A.I.R. 1944 P. C. 54 and ('45) 32 A. I. R. 1945 Pat. 210, *Rel. on.*

[P 124 C 1, 2]

Prem Lall — for Petitioner.

Gopal Prasad — for the Crown.

Order. — The petitioner has been convicted under R. 81 (4), Defence of India

Rules, and he has been sentenced to rigorous imprisonment for four months plus a fine of Rs. 100 or in default rigorous imprisonment for four months more. The case against the petitioner was that on 9th April 1944, he had sold a tin of kerosene oil to a man called Baldeo Mandal for Rs. 14. It was alleged that the controlled price for a tin of kerosene oil on that date was Rs. 5-3-9 excluding cartage. Therefore, the allegation against the petitioner was that he had sold a tin of kerosene oil at a price in excess of the controlled rate, and as such, had contravened the provisions of R. 81, Defence of India Rules. The point urged before me on behalf of the petitioner is that the prosecution has failed to prove what the controlled rate of a tin of kerosene oil was on the relevant date, and that the prosecution had failed to give any evidence of the due compliance of the provisions of R. 119, Defence of India Rules. In my opinion, both these contentions raised on behalf of the petitioner are well founded and should be accepted. In 1944 P.W.N. 571,¹ to which I was a party, it has been laid down that it is essential for a prosecution under R. 81 (4), Defence of India Rules, to prove that the competent authority had determined the manner in which a notice of the order was to be published and that the order had been so published before the alleged offence had been committed by the accused.

In the particular case under our consideration, there is no evidence to show that the authority competent under R. 81, Defence of India Rules, had fixed the price of kerosene oil. The only witness who was examined on the point was P. W. 6 a clerk in the Price Control Department of the district of Bhagalpur. This witness stated that the price of kerosene oil was Rs. 5-3-9 excluding cartage. The witness did not say who had fixed the price, and under what authority. Certain printed notices (Ex. 2 series) were admitted in evidence, which purport to show the price of certain commodities on certain dates including kerosene oil. Learned counsel for the petitioner has very rightly pointed out that these notices (Ex. 2 series) are not the original orders of the competent authority, nor are they certified copies thereof. He has contended that these notices (Ex. 2 series) are not admissible in evidence. It is well settled that the orders of the competent authority fixing the price of kerosene oil are public documents; they can be proved

by the production of the original orders or by certified copies thereof: *vide* 71 I. A. 83² and 1945 P. W. N. 65.³ Learned counsel appearing for the Crown referred me to the judgment of the trial Court, in which an observation has been made to the effect that the notifications fixing the price of kerosene oil were produced in the case. It is not clear to me from the aforesaid statement in the judgment whether the original notifications were produced in the trial Court. If the original notifications were produced in the trial Court, there is no justification as to why they were not admitted in evidence and as to why certified copies of the original orders were not kept in the record. Exhibit 2 series as they stand are certain printed notices, and they are not admissible in evidence. If Ex. 2 series are excluded from the record, then there is really no evidence to show, that a competent authority had fixed the price of kerosene oil on the relevant date.

Then again, it was for the prosecution to prove that the order fixing the price of kerosene oil had been duly published as required by R. 119, Defence of India Rules. No evidence has been given on behalf of the prosecution to show that the order of the competent authority was duly promulgated. The evidence of P. W. 6 to which I have already referred does not advance the case of the prosecution any further. P. W. 6 does not say anything about the promulgation of the order under R. 119, Defence of India Rules. Learned counsel appearing for the Crown referred me to the specimen copy of a licence (Ex. 3) para. 6 of which requires that the licensee shall prominently display a correct list of the maximum price of the commodity. It appears from the evidence that the son of the present petitioner is a licensee. The specimen copy (Ex. 3), however, does not show what were the terms of the particular licence which the petitioner's son had taken. Assuming that the petitioner's son had taken a licence in the form of Ex. 3, it does not relieve the prosecution of the duty of proving what the controlled rate of kerosene oil was on the relevant date and that the order fixing the rate of kerosene oil had been duly promulgated as required by R. 119, Defence of India Rules. Learned counsel for the Crown also referred

2. ('44) 31 A. I. R. 1944 P. C. 54; I. L. R. (1945) Mad. 237; 71 I. A. 83; 214 I. C. 1 (P. C.), K. R. Easwarmurthi Gounden v. Emperor.

3. ('45) 32 A. I. R. 1945 Pat. 210; 24 Pat. 143; 219 I. C. 148; 1945 P. W. N. 65, Ram Prasad v. Emperor.

1. ('45) 32 A. I. R. 1945 Pat. 307; 24 Pat. 29; 1944 P. W. N. 571, Jagarnath Sah v. Emperor.

me to the case in 1945 P. W. N. 121.⁴ That case, however, can be easily distinguished from the present case. In that case, a cash memo was issued to the purchaser showing the prices charged to be those fixed by the Sub-Divisional Officer, although in fact the prices charged were more. On the basis of that cash memo, it was held that the accused person had knowledge of the prices fixed by the Sub-Divisional Officer. In the present case there is nothing in the record to show what was the price fixed by the competent authority under Rule 31, Defence of India Rules, or that the order fixing the price had been duly promulgated so as to fix the petitioner with knowledge of the price. It is clear, therefore, that the conviction of the petitioner cannot stand. The result, therefore, is that the application is allowed, and the conviction and sentence passed against the petitioner are set aside. The fine, if paid, should be refunded to the petitioner who will be discharged from bail. It has been more than once pointed out that convictions for a breach of the rules intended for the protection of the community have to be set aside on grounds which can be easily avoided if the parties concerned exercise due care and attention in the strict observance of the requirements of the law. This is another case in which this unfortunate result could have been avoided if in the Court below steps had been taken to see that all the relevant evidence was brought into the record.

G.B./D.H. *Revision allowed.*

4. ('46) 33 A. I. R. 1946 Pat. 122 : 1945 P. W. N. 121, Prahlad Rai v. Emperor.

[Case No. 50.]

A. I. R. (33) 1946 Patna 125

AGARWALA AND MEREDITH JJ.

Hit Narain Mahton—Petitioner

v.

Bed Narain Mistry — Opposite Party.

Criminal Revn. No. 1193 of 1944, Decided on 14th December 1944, from order of Sessions Judge, Gaya, D/- 30th August 1944.

Penal Code (1860), Ss. 406 and 420 — Complainant A owing money to accused B on handnote and pledge of ornaments — Panchas brought by A settling dues of B at Rs. 155—A paying that amount to B—B accepting money but failing to return handnote and ornaments —B held guilty neither of criminal breach of trust nor cheating.

The complainant executed a handnote in favour of the accused for Rs. 106 and on the same day pawned certain silver ornaments with the accused for Rs. 18. The accused evaded settlement of the account and return of the handnote and the orna-

ments, so the complainant took panchas to his place. The panchas settled the dues at Rs. 155 and the complainant paid this amount to the accused in the presence of the panchas. The accused on the pretext of bringing the handnote went inside the house and went off from the back door and never returned. There was no evidence that the accused accepted Rs. 155 in full satisfaction of his dues. The accused was charged for misappropriation of Rs. 155 given to him and not for misappropriation of handnote and ornaments. There was no unqualified denial of the receipt of money by the accused:

Held that (1) there was no breach of trust with regard to Rs. 155 simply because there was no entrustment. The money was not given to the accused in trust but in payment of a debt and therefore it became his property as soon as he received it : ('19) 6 A. I. R. 1919 Cal. 155, *Rel. on.*

[P 126 C 1]

(2) nor could the accused be said to have misappropriated and converted the ornaments to his own use because he did not deny that the ornaments were pledged with him but alleged that he still held them in trust until the further amount claimed by him was paid off : 62 C. L. J. 487, *Disting.*

[P 126 C 2]

(3) nor could a charge of cheating be sustained against the accused as he could not be said to have had a dishonest intention at the time when he received the money. It may be that he took the money with a dishonest intention, saying he would return the ornaments but not intending to; but the inference was equally possible that he took the money and subsequently repented and decided to hold out for more. There would then be no dishonest intention in the taking of the money. Or, it may be that the accused took the amount under protest, in part payment, because he had nothing to do with the calling of the panchas, and it was not very clear whether he ever agreed to accept Rs. 155 in full satisfaction. [P 126 C 2 ; P 127 C 1]

Penal Code—

('45) Ratanlal, P. 981 Pt. 24, P. 983 Note "pledge" P. 1051, Note "Dishonestly."

('36) Gour, P. 1360 N. 4771; P. 1364, N. 4783, P. 1366, N. 4787, P. 1419, N. 4982, P. 1459, N. 5125.

Raj Kishore Prasad—for Petitioner.

Shambhu Prasad Singh—for Opposite Party.

Meredith J.—This rule has been issued on the application of one Hit Narain Mahton, who was convicted under S. 406, Penal Code, and sentenced to rigorous imprisonment for three months and to pay a fine of Rs. 200, with rigorous imprisonment for one month more in default, and whose appeal has been dismissed by the learned Sessions Judge of Gaya.

The facts that have been found by the Courts below are that on 11th November 1941, the complainant executed a handnote in favour of the petitioner for Rs. 106 4-0. The same day the complainant also pawned with the petitioner silver ornaments for Rs. 18. The petitioner evaded settlement of the account and return of the handnote and the ornaments, so the complainant took

panchas to his place. The *panchas* settled the total dues at Rs. 155. The complainant paid this amount in the presence of the *panchas*. On the pretext of bringing the document from inside the house, the petitioner went inside and would not come out. Subsequently on enquiry from the inmates of the house it was learnt that he had gone out the backway and gone off.

The defence was a refusal to admit that the money had been paid, and, in the alternative, that if it had been received, no criminal offence had been committed.

The first question is, for what sort of misappropriation the petitioner was charged and convicted. The learned Judge is not clear upon that point, but a reference to the charge shows that it related to the misappropriation of Rs. 155 entrusted to him and not to the misappropriation of the handnote and ornaments.

The question then is, whether any offence under S. 406 can be said to have been committed by Hit Narain in accepting this sum of Rs. 155 and retaining it for himself. I am of opinion that on those facts there was no breach of trust with regard to this money, simply because there was no entrustment. The money was not given to Hit Narain in trust but in discharge of a debt; and having been paid in discharge of a debt, it became Hit Narain's property as soon as he received it. A precisely similar question was considered by a Division Bench of the Calcutta High Court in *Gulam Hossain v. Emperor* (22 C. W. N. 1005).¹ In that case the complainant owed money to the accused on a mortgage bond. He went to their house and paid the amount settled in full satisfaction. The accused went inside their house with the bond and the money saying that they would return the bond, but they did not come back that day and afterwards denied the receipt of the money. On these facts their Lordships said:

"It seems clear that there was no trust which would bring the case under S. 406, Penal Code. Payment was made to the petitioners of a debt, directly that sum was paid the debt was paid off, and the money so paid they were entitled to retain. What they failed to do was to carry out the condition on which the money was paid, namely to return the bond. The learned Magistrate in his explanation suggests that the matter might constitute an offence under S. 403, Penal Code, but there, again, he is met with the objection that there was no dishonest misappropriation of this money or wrongful conversion to the use of the petitioners. The money was paid in satisfaction or part satisfaction of a debt. Their offence really consists in

their subsequently denying the fact of payment. That, however, could not be taken into account in the present trial."

In the present case there is not even an unqualified denial of the receipt of the money. The petitioner refrained from specifically denying receipt. He merely said:

"This petitioner does not accept the version but even assuming for argument's sake that the allegations were correct this petitioner begs to submit that it was purely a civil liability and no conviction in a criminal case could be obtained on the said allegation."

It is clear that the conviction in respect of breach of trust with regard to the sum of Rs. 155 cannot be sustained.

It is, however, argued for the opposite party that there was misappropriation and conversion to his own use of the ornaments. But here the first difficulty is that the petitioner was not charged with that. Secondly, it cannot be said that the petitioner has converted the ornaments to his own use, because he does not deny that the ornaments were pledged with him, and, on his own case, he is still holding them in trust against the time when what he claims is paid off. The learned advocate for the opposite party has relied upon a Single Bench decision in *Abinas Chandra Kumar v. Dhani Buksh* (62 C.L.J. 487);² but the case is clearly distinguishable. In that case the accused subsequently denied that the ornaments had been pledged with him at all or that he had made any loan, and consequently there could be a finding that he had intended to and had converted the property to his own use. Moreover, in that case there was at the time of payment no dispute at all as to its amount, and it could not, therefore, be said that the payment had been received under protest or in part satisfaction, and the ornaments retained because of a further claim. Thus, this case is not in point.

We have considered also whether the petitioner could properly have been charged with cheating and whether we should order a retrial upon such a charge. Here, however, the difficulty is that the learned Judge has himself held that

"we do not know whether the petitioner had any dishonest intention at the time when he received the money."

Obviously we do not. It may be that he took the money with a dishonest intention, saying he would return the ornaments but not intending to; but the inference is equally possible that he took the money and subsequently repented and decided to hold out

1. (19) 6 A. I. R. 1919 Cal. 155 : 49 I. C. 343 : 22 C. W. N. 1005.

2. (35) 62 C. L. J. 487.

for more. There will then be no dishonest intention in the taking of the money. Or it may be that the petitioner took the amount under protest, in part payment, because it is clear that he had nothing to do with the calling of the *panchas*, and it is not very clear whether he ever agreed to accept Rs. 155 in full satisfaction. The complainant in his evidence said that he himself collected and took the *panchas* there and he never said that the accused had agreed to the matter being referred to arbitration and to abide by the result. The head *panch* (P. W. 5), it is true, said that when they fixed the amount at Rs. 155 Hit Narain agreed to accept it. But there again, he may have done so under protest, and also, as I have said, he might have accepted it in good faith and subsequently repented of the bargain. In the circumstances, it does not appear that a charge of cheating could be sustained.

I would make the rule absolute, set aside the conviction and sentence and acquit the petitioner.

Agarwala J. — I agree.

G.N./D.H. *Accused acquitted.*

[*Case No. 51.*]

A. I. R. (33) 1946 Patna 127

MEREDITH AND IMAM JJ.

Sheikh Yusuf and others—Petitioners
v.

Emperor.

Criminal Revn. No. 837 of 1945, Decided on 11th September 1945, from order of Sessions Judge, Monghyr, D/- 9th June 1945.

(a) Criminal P. C. (1898), S. 162 — Use of police diary to prejudice of accused — Conviction cannot be maintained.

The Court would not be justified in using the police diary to the prejudice of the accused, even if the defence requests it to examine the diary. Where the Court peruses the diary it is impossible to avoid the conclusion that it has allowed its mind to be influenced by what it found in the diary and what was not before it. The conviction cannot be maintained in such a case. [P 127 C 2]

Cr. P. C.—

(41) Chitale, S. 162, N. 19, pt. 3, N. 20a.

(41) Mitra, S. 162, P. 507 'Effect of reception of evidence in contravention of this section.'

(b) Penal Code (1860), S. 147—Common object must be common to at least five persons.

The common object of assaulting, established with regard to four persons cannot be used to justify a conviction for rioting under S. 147, Penal Code. A common object must be established which is common to at least five persons. [P 128 C 2]

Penal Code—

(45) Ratanlal, S. 147, P. 334 'Ingredients.'

(36) Gour, S. 147, N. 1386.

Safdar Imam — for Petitioners.

S. G. Chakravarty for Government Advocate—
for the Crown.

Meredith J. — This is an application on behalf of five persons, who were convicted and sentenced by a first class Magistrate as follows: all five under S. 148, Penal Code, to one year's rigorous imprisonment each, Hanif, Halim, Ishaque and Alauddin to a further three months each under S. 323, and Yusuf to a further six months under S. 324, these additional sentences to run concurrently. Upon appeal the learned Sessions Judge of Monghyr has merely modified the convictions upon Hanif, Alauddin, Halim and Ishaque, substituting convictions under S. 147, Penal Code, and reducing the sentences to six months.

The prosecution case was that on 9th December 1944, the informant Mohiuddin was sleeping at his *khalihan*. When he awoke, finding that two of the petitioners were removing his crops, while the other three were standing in front of him, he got up, and gave the petitioner Hanif a lathi blow on his mouth and then ran away. The four petitioners, except Hanif, then gave chase, and assaulted him. Yusuf was said to have used a *bhala*, Halim a *bana*, and the rest *lathis*.

The defence was that Mohiuddin had been caught with a village girl, Sogra, and had consequently been assaulted by the villagers.

The learned Judge has unfortunately used the police diary to the prejudice of the accused. He says that he felt himself justified in doing so, as a special request was made on behalf of the defence that the diary should be called for and perused. Mr. Safdar Imam, who represents the petitioner in this Court, also argued the appeal before the learned Judge, and he states categorically that he never asked the Judge to peruse the diary. He merely asked him to refer to the police final report, which was definitely in favour of the accused, the police having reported that the alleged eye-witnesses had not identified any one before them but had given hearsay stories, that the complainant had changed the place of occurrence, and that the Sogra story was true. It must be said, however, that even if the defence had requested the learned Judge to examine the police diary, that would not justify him in using it to the prejudice of the accused. It seems impossible to avoid the conclusion that he has allowed his mind to be influenced by what he found in the

diary and what was not before him. In dealing with the diary he says:

"The request was perhaps ill-advised as a perusal of the police diary only strengthens the prosecution case and indicates that the defence case was subsequently concocted."

The defence case was supported by the evidence of several witnesses, and, if it was contradicted by something which the Judge found in the diary, it was supported by what the police said in the final report. It is impossible to know what view the Judge would have taken of the evidence of the defence witnesses had he not used the diary. That is not all. The Judge also relies upon the diary for a finding that the names of the accused persons were given but to a constable and a *chaukidar* directly after the occurrence. There was no such evidence before him, as the constable and *chaukidar* were not examined as witnesses. He has also taken from the diary the fact that there was some sort of admission before the police by some one that two of the accused had been present at the scene of the occurrence, and one of them had received an injury at the hands of the complainant, or rather, according to the Judge, not at the hands of the complainant but from his teeth. Having dealt with the contents of the diary at length, the Judge proceeds:

"I, therefore, hold that the prosecution in this case has fully proved the charges against the accused persons and that the defence case was an after-thought and cannot be accepted."

In the circumstances the decision of the learned Judge cannot be maintained. We have considered whether the case should be remanded for re-hearing the appeal, but there are other defects in the judgment, and there is so much uncertainty as to the circumstances in which the assault took place that, in my opinion, a remand would not be warranted. The common object, and the sole common object, specified in the charge was to commit theft. That common object was most certainly not established. Mohiuddin in the first information had made it clear that he awakened and found the petitioners standing, and it was his inference that they had come to commit theft. The learned Judge says:

"Even if the story of theft be regarded as an after-thought, the complainant not unnaturally assumed that the accused persons had come there for some nefarious purpose."

That, however, will not do. No doubt, it is possible that the petitioners had come with the common object of assaulting Mohiuddin, but they were not charged with the common object of committing assault, and had the

charge been different the defence might possibly have taken a different course. Moreover, while if the prosecution evidence be accepted, it is clear that four at least were actuated by a common object of assaulting Mohiuddin, that is by no means so obvious with regard to Hanif, who merely stood, received the first blow from the complainant, and apparently did nothing more. The common object of assaulting even if established with regard to four persons could not be used to justify a conviction for rioting. A common object must be established which is common to at least five persons. Then, again, Hanif, who admittedly took no part in the assault, has been convicted for the specific offence under S. 323. It may well be that the petitioners, or some of them, did assault Mohiuddin, but the circumstances in which the assault took place and the motive for it appear to be wrapped in uncertainty, and we cannot lose sight of the fact that Mohiuddin admitted that it was he who struck the first blow. Whatever the reason, he struck one of the petitioners before any one struck him.

Having regard to all these features of the case, I am of opinion that a remand is contra-indicated, and I would accordingly make the rule absolute, allow the application, and set aside the conviction and sentences of all the petitioners.

Imam J. — I agree.

D.R./D.H.

Convictions set aside.

[Case No. 52.]

A. I. R. (33) 1946 Patna 128

PANDE J.

Sitaram Gope — Petitioner

v.

Emperor.

Criminal Revn. No. 628 of 1945, Decided on 9th July 1945, from order of Addl. Sessions Judge, Darbhanga, D/- 28th March 1945.

Criminal P. C. (1898), Ss. 342, 349 and 537 — Submission of case under S. 349 — Fresh evidence taken by Magistrate under S. 349 — Fresh examination under S. 342 is necessary.

The omission to examine the accused under the mandatory provisions of S. 342 is an illegality vitiating the trial and not a mere irregularity curable under S. 537. Such examination is imperative even though the accused may have been previously examined under that section after the prosecution evidence that stood against him at that time. [P 130 C 1]

When a case is submitted to another Magistrate under the provisions of S. 349 at the end of a trial on the discovery that owing to the accused having a previous conviction he was liable for a more severe sentence than could be awarded by the trying

Magistrate and the Magistrate to whom the case is submitted takes fresh evidence under S. 349 sub-s. (2), he is bound to examine the accused afresh under S. 342 although he had once been already examined under that section before the submission of the case : ('21) 8 A.I.R. 1921 Pat. 11 ; ('22) 9 A.I.R. 1922 Pat. 158 and ('40) 27 A.I.R. 1940 Pat. 295, *Rel. on*; ('25) 12 A.I.R. 1925 Pat. 414, *Dist. ing.* [P 129 C 2]

Cr. P. C. —

('41) Chitaley, S. 342 Notes 9 and 35.

('41) Mitra, Pages 1127 to 1131 Note "Time for examination."

Mrs. Dharamshilla Lall—for Petitioner.

S. N. Banerji — for the Crown.

Order.—The petitioner was convicted under S. 411/75, Penal Code, and sentenced to rigorous imprisonment for two years by the Subdivisional Magistrate of Madhubani. An appeal against that order was dismissed by the Additional Sessions Judge of Darbhanga, who heard the appeal.

It appears that the case was originally tried by a Magistrate with second class powers at Madhubani on the charge under S. 411, Penal Code. On the completion of the trial, it was discovered that the accused had a previous conviction under S. 379, Penal Code. Therefore, under the provision of S. 349, Criminal P. C., the trying Magistrate submitted the record to the Subdivisional Officer as in the opinion of the trying Magistrate the accused was liable for more severe sentence than he was competent to award. When the record of the case was submitted to the Subdivisional Magistrate he resummoned three of the prosecution witnesses for further examination and also summoned one new witness. These witnesses were examined and cross-examined. The accused was examined under S. 342, Criminal P. C., on the completion of the prosecution evidence in the Court of the Magistrate with second class powers. But when fresh evidence was taken by the Subdivisional Magistrate the accused was not asked anything after further examination of the prosecution witnesses. It is contended on behalf of the petitioner that the failure of the Subdivisional Magistrate to examine the petitioner after fresh evidence was taken in the Court of the Subdivisional Magistrate was an illegality and not an irregularity which could be cured under the provisions of S. 537 and, therefore, the conviction of the petitioner was illegal.

In support of this contention, *Mrs. Dharamshilla Lall* cited two Division Bench decisions of this Court in 6 Pat. L. Jour. 174¹

1. ('21) 8 A. I. R. 1921 Pat. 11 : 6 Pat. L. Jour. 174; 61 I. C. 715, *Gulam Rasul v. Emperor*.

and 6 Pat. L. Jour. 644.² Those cases are authority for the proposition that omission to examine the accused under S. 342, Criminal P. C., vitiates the trial. *Mr. S. N. Banerji*, who appeared for the Crown, contended that the present case is distinguishable from the cases cited as the petitioner in the present case was actually examined by the Magistrate in the first Court, and the omission to examine the accused again in the Court of the Subdivisional Magistrate was at best an irregularity. In support of this contention he referred to the decision of a Division Bench of this Court in 6 P.L.T. 154.³ In that case the position was quite different. The accused was examined in the trial Court but on appeal the appellate Court remitted the record to the lower Court for taking fresh evidence and the record was returned to the appellate Court with the fresh evidence. It was contended in that case that the accused should have been re-examined after examination of the witnesses for the prosecution was taken on remand. His Lordship *Mullick J.* referring to the provision of S. 428, Criminal P. C., pointed out that there was no such provision and observed that as examination of witnesses after remand may be made even in the absence of the accused, the provisions of S. 342 do not apply to it. But, in the present case, the trial of the case was not concluded by the Magistrate with second class powers. The trial was actually concluded in the Court of the Subdivisional Magistrate and when fresh evidence was taken the accused should have been re-examined and asked what his defence was and whether he would adduce evidence in support of his defence. Therefore the decision in 6 P. L. T. 154³ is, in my opinion, not applicable to the facts of the present case. Further this case was considered by a Division Bench of this Court recently in A.I.R. 1940 Pat. 295.⁴ In that case their Lordships reiterated the principle laid down in the earlier decisions of the two Division Bench cases referred to above that the failure to comply with the provisions of S. 342, Criminal P. C., is an illegality which vitiates a trial, and it is not cured by S. 537, Criminal P. C. Referring to the decision in 6 P. L. T. 154³ their Lordships (*Harries C. J.* and *Meredith J.*) observed as follows :

2. ('22) 9 A.I.R. 1922 Pat. 158 : 6 Pat. L. Jour. 644 : 63 I. C. 825, *Mitarjit Singh v. Emperor*.

3. ('25) 12 A.I.R. 1925 Pat. 414 : 4 Pat. 488 : 86 I. C. 459 : 6 P.L.T. 154, *Mohiuddin v. Emperor*.

4. ('40) 27 A.I.R. 1940 Pat. 295 : 186 I. C. 227, *Feroze Kazi v. Emperor*.

"It is unnecessary in this case to decide whether the failure to observe the provisions of S. 342, Criminal P. C., is merely an irregularity curable under S. 537 or is an illegality which vitiates the whole trial and which can never be cured. Even if what I have pointed out in this case only amount to irregularities, they are of such a serious nature that they must be held to have occasioned a failure of justice."

Thus, on the authorities, it is clear that the omission to examine the accused under S. 342, Criminal P. C., is an illegality which vitiates the trial. Such examination is, in my opinion, imperative under the provision of the section even though the accused may have been previously examined under that section after the prosecution evidence that stood against him at that time. It follows that the conviction of the accused in the present case is vitiated by the omission to observe the mandatory provision of S. 342. Therefore, the conviction and sentence passed against the petitioner must be set aside and the same remanded for rehearing from the stage where the illegality commenced.

D.H.

Conviction set aside.

[Case No. 53.]

A. I. R. (33) 1946 Patna 130

SHEARER J.

Dinanath Bania — Petitioner

v.

Emperor.

Criminal Revn. No. 195 of 1945, Decided on 27th March 1945, from order of Sessions Judge, Arrah, D/- 21st December 1944.

Bihar Essential Foodgrains (Possession and Storage) Order, 1943, S. 3—Person found taking carts loaded with more than 25 maunds of rice—Offence does not fall under Section 3.

What the Bihar Essential Foodgrains (Possession and Storage) Order, 1943, aims at is what is popularly known as "hoarding" by persons who are neither producers nor licensed dealers. It is not an offence under S. 3, for a person to be in possession of more than 25 maunds of rice loaded in bullock carts while he is taking them to a neighbouring district. The words "in any premises occupied by him" in S. 3 qualify the word "keep" as well as the word "store." [P 130C 2]

Harinandan Singh and Brij Kishore Narain Singh—for Petitioner.

Government Pleader—for the Crown.

Order. — This is an application by one Dinanath Bania, who has been convicted under R. 81 (4), Defence of India Rules, and has been sentenced to undergo rigorous imprisonment for three months. On 22nd February 1944, a Sub-Inspector of Police came across four bullock-carts heavily loaded with bags of rice. The total quantity of rice in the bullock-carts was between 60

and 70 standard maunds, and the Sub-Inspector took the petitioner into custody as he was the person in charge of the carts and as he suspected that he was taking the carts out of Shahabad into the neighbouring district of Saran. The charge against the petitioner was in the following terms:

"That you, on or about the 20th day of February 1944, at Gajrajgunj, P. S. Arrah Mofasil were found in possession of more than twenty-five standard maunds of rice without a permit and without a licence under the Foodgrains Control Order though you are not a bona fide producer of rice, and this was thus in contravention of the Bihar Essential Foodgrains (Possession and Storage) Order, 1943, and thereby committed an offence punishable under R. 81 (4), Defence of India Rules, and within my cognizance, and I hereby direct that you be tried by me on the said charge."

Section 3, Bihar Essential Foodgrains (Possession and Storage) Order, 1943, does not, however, make it an offence for a person to be in possession of more than 25 standard maunds of rice in the circumstances in which the petitioner was in possession of the rice which was seized by the Sub-Inspector. Section 3 states:

"No person other than a producer of any essential foodgrain or a dealer licensed under the Foodgrains Control Order, 1942, shall keep or store in any premises occupied by him a total quantity of essential foodgrains exceeding 25 standard maunds unless he has obtained a written permit from the District Magistrate of the district in which he resides authorising him to do so."

The words "in any premises occupied by him" qualify the word "keep" as well as the word "store." That is clear, in the first place, from the punctuation, and secondly, from the words which immediately follow "or permit any other person to keep or store in any such premises." What the order aimed at was apparently what is popularly known as "hoarding" by persons who were not either producers or licensed dealers. If the learned trying Magistrate had kept clearly in view the provisions contained in sub-ss. (3) and (4) of S. 221, Criminal P. C., in drawing up the charge, it would at once, I think, have been apparent to him that the offence, if any, which the petitioner had committed, was not an offence under the Bihar Essential Foodgrains (Possession and Storage) Order, 1943, but an offence under the Foodgrains Control Order, 1942. If there had been evidence on the record to show that the petitioner purchased the whole of this rice in some market in Shahabad and was taking it to some other market either in that district or in another district to resell, it might have been open to me to alter the conviction while maintaining the sentence.

There is, however, no such evidence, and I have, therefore, no option but to set aside the conviction and sentence. The petitioner is discharged from his bail.

V.B. *Conviction set aside.*

[Case No. 54.]

A. I. R. (33) 1946 Patna 131

SHEARER J.

Brajamohan Mahapatra—Appellant
v.

Ramendra Kumar Deb Mandal and
others—Respondents.

Appeal No. 45 of 1944 (Cuttack), Decided on 7th September 1945, from appellate order of District Judge, Cuttack, D/-24th July 1944.

Limitation Act (1908), S. 20—"Agent," meaning of—Attachment of movables of judgment-debtor by Chakla Kanungo under warrant issued by Court—Kanungo subsequently selling them and making over proceeds to decree-holder—*Held* payment was not one by agent of judgment-debtor so as to save limitation.

In execution of a decree a Chakla Kanungo attached certain movable property of the judgment-debtor in pursuance of a warrant issued by the Court directing him to seize the movables of the judgment-debtor and hold them unless and until the amount outstanding under the decree was paid. The Kanungo subsequently sold the properties and paid the proceeds of sale to the decree-holder. The question was whether this payment was a part payment of a debt by the agent of the judgment-debtor within S. 20, Limitation Act:

Held that the Chakla Kanungo in seizing the movables was acting under the authority and as an agent of the Court and not as an agent of the judgment-debtor. He could not, therefore, be said to be acting under the implied authority of the judgment-debtor in selling the property and making over the proceeds to the decree-holder. The part payment was not, therefore, one by an agent duly authorised in that behalf within S. 20, Limitation Act: ('21) 8 A. I. R. 1921 Mad. 704, *Not approved*; ('27) 14 A. I. R. 1927 Mad. 80 and ('33) 20 A. I. R. 1933 Bom. 91, *Ref.* [P 132 C 2]

Limitation Act —

('42) Chitaley, S. 20 N. 18.

S. N. Das Gupta—for Appellant.

S. P. Mahapatra—for Respondents.

Judgment. — This second appeal arises out of a proceeding in execution of a rent decree. The decree was passed in 1931, and on a number of occasions subsequently execution was levied on it. In 1934, and again in 1935, certain movable property belonging to several of the judgment-debtors was attached. These attachments were made by a Chakla Kanungo, and, in each case, the Chakla Kanungo sold the property and made over the sale proceeds to the decree-holder. The question that arises in the appeal is a somewhat curious one, namely, whether in

making the payments which he did to the decree-holder, the Chakla Kanungo was an agent authorised in that behalf by the judgment-debtors. The appeal, it should be explained, came previously before a Divisional Bench which held that S. 20, Limitation Act, might apply to save limitation and remanded the case in order that it might be determined whether or not these payments did in, fact, come within the purview of that section. The contention put forward on behalf of the decree holder is, on the face of it, a somewhat startling one. Nevertheless, it has been accepted by the learned District Judge who relied on two decisions of the Madras High Court. In the earlier of these decisions, 44 Mad. 971,¹ much reliance was placed on the decision of the House of Lords in (1864) 11 H.L.C. 115.² Referring to that decision Coutts-Trotter J. said that the principle to be deduced from it was this :

"that if a debtor's assets are so placed either by his own act or by operation of law, that, if some one other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant."

The facts with which Coutts-Trotter and Sadasiva Ayyar JJ. had to deal in that case were of a very extraordinary kind. It appears that after a final decree had been passed for the sale of certain mortgaged property, the property was acquired under the Land Acquisition Act and the compensation money was paid into Court, the Collector having presumably been informed that a final decree for the sale of the property had been passed. Eventually, the District Judge made an order directing that the money should be paid out to the mortgagee decree-holder. It was contended that in making this payment the District Judge was acting as the authorised agent of the judgment-debtor, and that, in consequence, it availed to save limitation. The amount deposited in Court as compensation was, it should be explained, less than the amount due under the decree, and the decree-holder had levied execution for the balance. The other and later decision is that of a Judge sitting singly. In that case, A. I. R. 1927 Mad. 80,³ the facts bore a resemblance, but only a superficial resemblance, to

1. ('21) 8 A. I. R. 1921 Mad. 704: 44 Mad. 971 : 68 I. C. 100, Gobindasami Pillai v. Dasai Goundan.

2. (1864) 11 H.L.C. 115 : 11 L.T. (N.S.) 68 : 13 W. R. 20, Chinnery v. Evans.

3. ('27) 14 A. I. R. 1927 Mad. 80 : 98 I.C. 571, Venkatasubayya v. G. Seshayya.

those with which the Court had to deal in the earlier case. A sum of money had been deposited to the credit of the father of the judgment-debtor in a suit in which he was the plaintiff and which was pending when the suit in which the decree was eventually passed was instituted. The money was attached before judgment, and after judgment was delivered and the suit was decreed it was paid out to the decree-holder. Jackson J., relying on the observations of Coutts-Trotter J., which I have already quoted, would apparently have been prepared to hold that, in making this payment, the Court was acting as the agent of the judgment-debtor if the money had been deposited to the credit of the judgment-debtor and not, as in fact it was, to the credit of the father of the judgment-debtor. Mr. S. P. Mahapatra, for the respondents, would extend the proposition laid down by Coutts-Trotter J. even further than Jackson J. was apparently prepared to extend it. The learned advocate, as I understand him, argues with, it must be conceded, a certain amount of ingenuity, that if the Court acts as the agent of a judgment-debtor in paying over to the decree-holder money which has been paid into Court to the credit of the judgment-debtor and has been attached, it equally acts as his agent in paying out money which may not have been deposited in Court but which represents the sale proceeds of property which has been attached and which, but for the rules under which the Chakla Kanungo acted, would have been brought into Court and sold there. Wadia J. of the Bombay High Court in 58 Bom. 505⁴ said that the proposition laid down by Coutts-Trotter J., was too broadly expressed. I took time yesterday to read the decision in (1864) 11 H. L. C. 115² and, after having read and considered it, I agree entirely with Wadia J. The question at issue in (1864) 11 H. L. C. 115² turned on the language used in an Irish Statute which authorised a Court of equity to appoint a receiver to receive "such parts of the rents of the mortgaged premises as shall be sufficient to pay such arrears of interest, and also the accruing interest of the said mortgage money from time to time, one half year when the other shall become due, until the whole of such interest due on the mortgage shall be discharged." The Lord Chancellor at page 134 of the Report observed :

"I think no reasonable doubt can be entertained, that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursu-

4. (1933) 20 A. I. R. 1933 Bom. 91 : 58 Bom. 505 : 143 I. C. 698, Currimbhai Abdul Hussain v. Ahmedalli Luckmanji.

ance of the order, is payment in law by the legal agent of the person liable to pay."

Lord Cranworth also dealt with the point very briefly merely observing:

"It was argued that a payment to be brought within this statute must be a payment by the mortgagor, not by a receiver who is an officer of the Court. But for this argument there is no warrant. The statute says nothing as to the person by whom the payment is to be made."

I find it difficult to understand how Coutts-Trotter J. deduced from these very brief observations the broadly expressed general principle which he did. In my opinion, neither of the two decisions relied on by the District Judge, even assuming that they were correct, applies to the facts of this particular case. It must, of course, be conceded that the payments which the Chakla Kanungo made to the decree-holder operated as part payments of the decretal amount. It is, however, perfectly clear that the Chakla Kanungo was not expressly authorised by the judgment-debtors to make them. Can it possibly be said that the Chakla Kanungo was impliedly authorised to make them by the judgment-debtors? The warrants issued to the Chakla Kanungo directed him to seize the movables of the judgment-debtors and hold them unless and until the amount outstanding under the decree was paid. In seizing the movables the Chakla Kanungo was acting under the authority and as an agent of the Court and not at all as an agent of the judgment-debtors. That being so, it seems to me wholly absurd to suggest that, subsequently, in selling the movables which he had seized, and making over the sale proceeds to the decree-holder, he was acting with the implied authority of the judgment-debtors and as their agent. In my opinion, the decision of the learned District Judge is erroneous. That being so, the order of the Court will be set aside and the appeal will be allowed with costs throughout. The hearing fee is assessed at two gold mohurs.

K.S./D.H.

Appeal allowed.

[Case No. 55.]

A. I. R. (33) 1946 Patna 132

FAZL ALI C. J. AND RAY J.

Firangi Ram Modi — Appellant

v.

Basudeo Modi and others

— Respondents.

Appeal No. 194 of 1943, Decided on 24th July 1945, from original order of Addl. Sub-Judge, Hazaribagh, D/- 27th January 1943.

Civil P. C. (1908), O. 22, Rr. 4 and 11 — Appeal—Abatement—Decree in favour of joint shareholders having unascertained shares — Appeal against decree abating against some — Appeal abates as a whole.

Where a decree is passed in favour of joint shareholders having unascertained shares and the appeal against the decree has abated as against some of them, the appeal abates as a whole, because if the decree of the Court below is modified as against the respondent against whom the appeal has not abated, there will be two contradictory decrees, one against the respondents against whom the appeal has not abated and another in favour of respondents against whom the appeal has abated : ('39) 26 A. I. R. 1939 Pat. 198, *Rel. on* ; ('40) 27 A. I. R. 1940 P. C. 215, *Disting.* [P 133 C 1]

C. P. C.—

('44) Chitale, O. 22, R. 4 N. 23 pt. 3.

('41) Mulla, Page 933, "Cases . . . as a whole."

S. S. Sinha — for Appellant.

A. B. Jha and Chandra Sekhar Prasad —
— for Respondents.

Fazl Ali C. J.—This appeal fails on the preliminary ground of abatement. It appears that the appellants were defendants in a suit for account brought by the respondents. The suit was decreed and the appellants preferred an appeal in the Court below. While the appeal was pending, it was stated by the respondent that the appeal had been compromised and on investigation it was found that the compromise had been in fact arrived at and therefore the suit was disposed of by the appellate Court on the terms of the compromise. Thereafter the appellants preferred this appeal to this Court. This appeal admittedly has abated as against respondents 4 to 8 who are minors. The question is what is the effect of this abatement upon the appeal as against the other respondents. It is not denied that the shares of the respondents are unascertained. That being so, this case falls within the rule laid down in A. I. R. 1939 Pat. 198¹ where it has been pointed out that under no circumstances can a decree be affirmed as to the unascertained shares of some joint shareholders and reversed as to the unascertained shares of the other joint shareholders. It is quite clear that if the decree of the Court below is modified as against the present respondents there will be two contradictory decrees, one against the present respondents and another in favour of the respondents against whom the appeal has abated. Such being the case, the appeal must be deemed to have abated as a whole. Mr. Sinha who has argued the case with his usual ability

referred us to 67 I. A. 406² where it was held that for the purpose of giving effect to the rights of the parties in an administration suit it is open to the Judge in his discretion under O. 1, R. 10, Civil P. C., to add as a party the representative of a person against whom the suit has abated. In that case the representative of the person against whom the suit had abated had herself applied for being made a party. Here the position is quite different. In the circumstances of the case, I would hold that the whole appeal has abated and must be dismissed. There will be no order for costs.

Ray J.—I agree.

D.S./D.H.

Appeal dismissed.

2. ('40) 27 A. I. R. 1940 P. C. 215 : I. L. R. (1940) Kar. P. C. 410 : I. L. R. (1941) Bom. 8 : 67 I. A. 406 : 191 I. C. 113 (P. C.), Mahomedally Tyebally v. Safiabai.

[Case No. 56.]

A. I. R. (33) 1946 Patna 133

PANDE J.

Mrinmayee Ray — Petitioner

v.

*Sreepati Charan Das and another —
Opposite Party.*

Civil Revn. No. 31 of 1945 (Cuttack), Decided on 7th September 1945, from order of Rent Execution Officer, Cuttack, D/- 3rd January 1945.

Civil P. C. (1908), O. 21, R. 90 — Decree for rent against several judgment-debtors—Death of one judgment-debtor before execution — Legal representative not joined in execution—Holding sold in execution — Sale is void as regards deceased judgment-debtor's interest — His legal representative cannot apply for setting aside sale.

A cosharer landlord obtained a decree for rent against several judgment-debtors one of whom died before execution was taken out. The holding in respect of which the decree was passed was sold in execution without the legal representatives of the deceased judgment-debtor having been brought on record. The legal representative of the deceased judgment-debtor then applied for setting aside the sale under O. 21, R. 90 :

Held that the sale was void to the extent of the deceased judgment-debtor's interest in the holding and therefore the legal representative whose interest was not affected by the sale could not apply under O. 21, R. 90: ('26) 13 A. I. R. 1926 Cal. 1219, *Foll.* [P 134 C 2]

C. P. C.—

('44) Chitale, O. 21, R. 90 Notes 8 and 34.

('41) Mulla, Page 884, Note 'Who may apply under this rule.'

M. S. Rao — for Petitioner.

S. K. Ray — for Opposite Party.

Order.—The only question that arises is whether the opposite party is entitled to make an application under O. 21, R. 90, Civil

1. ('39) 26 A. I. R. 1939 Pat. 198 : 182 I. C. 740, Rajeswari Prasad Singh v. Saheb Singh.

P. C. That rule provides that besides the parties to the execution proceedings a person whose interests are affected by the sale may apply under that rule for setting aside the sale on the ground prescribed in that rule. The opposite party claims to be an adopted son of one Dayanidhi Das, one of the judgment-debtors in a decree of rent suit. There were three other judgment-debtors, Upendra Das, Antarjami Das and Sarheswar Das. The holding in question is entered in the name of Dayanidhi and the other three just named. The suit for rent was by a cosharer landlord. The decree was passed on 8th July 1938. Dayanidhi Das, one of the judgment-debtors, died on 5th February 1939. The decree-holder took out execution against the judgment-debtors on the record but on the report of the peon for service of notice under O. 21, R. 22, it was discovered that Dayanidhi Das had died before the petition of execution was filed. Therefore Dayanidhi's name was struck off the record on the application of the decree-holder. The execution proceeded against the remaining judgment-debtors and the entire holding was sold. The opposite party made an application for setting aside the sale under O. 21, R. 90. This was resisted by the decree-holder on the ground that the share of Dayanidhi Das in the holding was separately specified to be two annas, nine krants and as the execution did not proceed against him his interest in the holding is in no way affected by the sale. Therefore the opposite party was not entitled to maintain his application. The lower Court, however, rejected this contention and held the opposite party entitled to apply under O. 21, R. 90, for setting aside the sale. Against that order is this civil revision application.

The learned advocate urged that the sale in regard to the interest of Dayanidhi Das in the holding is null and void and so the opposite party is not affected by the sale. In support of this contention reliance is placed on a decision of a Division Bench of the Calcutta High Court in 98 I. C. 206.¹ That was a case in which sale was held in execution of a decree for rent under the Bengal Tenancy Act in ignorance of the death of one of the tenants and without impleading his legal representatives in his stead. The legal representatives applied under O. 21, R. 90, Civil P. C., to set aside the sale. It was held that

"(1) that the sale was not only void but was valid

1. ('26) 13 A.I.R. 1926 Cal. 1219 : 98 I. C. 206, Rampada Nag v. Kanai Rai.

to the extent of the shares of the judgment-debtors who were alive on the date of the sale, (2) that the interest of the deceased judgment-debtor was not affected by the sale and (3) that the legal representatives had no right to apply under O. 21, R. 90, Civil P. C., to set aside the entire sale."

The position in the present case appears to be very nearly similar. Here Dayanidhi Das had died before execution had taken place, and his legal representative was not substituted in his place. Therefore the sale is void to the extent of Dayanidhi Das's interest in the property and so the opposite party is not in any way affected by the sale. Therefore he is not entitled to apply for setting aside the sale under O. 21, R. 90, Civil P. C.

I would, therefore, set aside the order of the lower Court and allow the petition. The hearing fee is assessed at one gold mohur.

K.S./D.H.

Revision allowed.

[Case No. 57.]

A. I. R. (33) 1946 Patna 134

SHEARER AND PANDE JJ.

Guna Durga Prasad Rao and another
— Appellants

v.

D. V. Krishna Rao and others—
Respondents.

Appeal No. 6 of 1942 (Cuttaek), Decided on 7th September 1945, from original order of Dist. Judge, Berhampore, D/- 12th November 1941.

(a) Civil P. C. (1908), O. 21, Rr. 97, 99 and 102 and S. 47—R. 102 does not apply to involuntary sale—Suit for partition by A against G decreed and certain property allotted to A—Pending suit, property purchased by R in execution of money decree obtained by R against G—A resisted by R in taking possession—R. 102 does not apply and A's application under R. 97 can be dismissed—A can bring separate suit for possession.

Order 21, R. 102 does not in terms apply to an involuntary sale as, for example, a sale in execution of a decree: ('35) 22 A. I. R. 1935 Pat. 230, *Rel. on.* [P 135 C 2]

One A instituted a suit for partition against G in 1931 and obtained a decree in 1939 whereby certain property was allotted to him. Pending this suit, the property covered by it was purchased by one R in execution of money decree obtained by R against G. When A attempted to take possession of the property he was resisted by R and, therefore, A made an application under O. 21, R. 97. The application was dismissed by the Court. It was contended by A that the Court, by reason of the provisions of O. 21, R. 102, had no jurisdiction to make the order of dismissal:

Held that O. 21, R. 102 did not apply as the property had not been transferred to R by G. It was transferred by the Court which executed the decree. R being a person other than the judgment-debtor who claimed in good faith to be in possession of the property on his own account, the

Court was bound under O. 21, R. 99 to make an order dismissing the application under O. 21, R. 97. [P 135 C 1,2]

Held further that A to whom the property had been allotted at the partition could institute a separate suit asking for a declaration of his title and for recovery of possession. If such a suit was instituted, it would not be open to R to contend that the suit was barred inasmuch as an application could and ought to have been made to the Court executing the decree in the partition suit under S. 47: ('28) 15 A. I. R. 1928 Bom. 65, *Rel. on*. [P 136 C 2]

C. P. C.—

('44) Chitaley, O. 21, R. 102, N. 1, pt. 5.

(b) Civil P. C. (1908), O. 21, R. 102—'Property' whether means interest in property (*Quære*).

It is doubtful whether the expression 'property' in R. 102 can be construed as meaning "an interest in the property" as that of a mortgagee. [P 136 C 1]

P. V. B. Rao and L. Panigrahi—for Appellants.

R. K. Ratho—for Respondents.

Shearer J. — This appeal arises out of an order of the learned District Judge of Ganjam dismissing an application made under O. 21, R. 97, Civil P. C. No appeal lies against such an order. It is, however, contended by the appellants that the learned District Judge, by reason of the provisions contained in O. 21, R. 102, had no jurisdiction to make the order, and ought to have dealt with the matter under S. 47 of the Code. The property in respect of which the application was made was purchased by the respondent at a sale in execution of a decree for money which he had obtained against one Goona Seethayamma. The sale took place on 14th March 1938, and, subsequently, on 29th November 1938, the respondent was put in possession of the property. Now, some considerable time previously, in 1931, Goona Seethayamma and her four sons had been impleaded as defendants in a partition suit instituted by her step-sons who are the present appellants. This suit was dismissed by the trial Court in 1935, but on appeal it was decreed by the High Court of Madras in 1939. The property with which we are now concerned was included in the schedules to the plaint in the partition suit as part of the property of the joint family of the plaintiffs and the defendants and finally it was allotted to the plaintiffs. When, however, the plaintiffs attempted to take possession of it in execution of their decree, they were resisted by the respondent, and, therefore, made an application under O. 21, R. 97. It is clear that the respondent was a person other than the judgment-debtor who claimed in good faith to be in possession of

the property on his own account, and the learned District Judge was, therefore, bound under O. 21, R. 99, to make an order dismissing the application, unless the case was one to which O. 21, Rule 102 applied. In repelling the contention that O. 21, R. 102 applied, the learned District Judge relied on an observation of Fazl Ali J., as he then was, in A. I. R. 1935 Pat. 230,¹ that "O. 21, R. 102, does not in terms apply to an involuntary sale." I respectfully concur in this observation. It seems to me quite impossible to say that the respondent is "a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed." The property has not been transferred to the respondent by Goona Seethayamma; it has been transferred by the Court which executed the decree against the will of Goona Seethayamma, and, for all we know, in spite of her utmost endeavours to prevent it. Moreover, the interest which the respondent acquired in the property as a result of the sale in execution of his decree was not precisely the interest which he would have acquired if Goona Seethayamma had sold the property to him by private treaty. For the appellants, much reliance was placed in this Court, as also in the Court below, on a decision of a Judge of the Calcutta High Court, sitting singly, in A.I.R. 1939 Cal. 709.² That learned Judge there observed :

"Admittedly, the general doctrine of *lis pendens* under S. 52, T. P. Act, has been extended by judicial decision to involuntary alienations and I see no reason why the same principle should not apply in the case of transfers which are covered by Rule 102."

With the greatest respect, it seems to me that the conclusion which the learned Judge has drawn does not follow necessarily, or at all, from the premises. Moreover, it has escaped the notice of the learned Judge that O. 21, R. 102 of the present Code corresponds to S. 333 of the Code of 1882. Now, in 1882 the doctrine of *lis pendens* had not yet been extended by judicial decision to transfers in *invitum*. It may perhaps be desirable that O. 21, R. 102, should be made applicable to sales in execution of decrees, and, more particularly, to sales in execution of mortgage decrees, but it is for the Legislature or the High Courts to amend the rule. It is not for the Courts to strain the language used in the rule and to attempt to put on it an inter-

1. ('35) 22 A. I. R. 1935 Pat. 230 : 157 I. C. 86, Haribar Prasad v. Lakhani Lal.

2. ('39) 26 A.I.R. 1939 Cal. 709 : I. L. R. (1939) 2 Cal. 63: 185 I. C. 424, Bepin Chandra v. Hem Chandra.

pretation which, in my opinion, it cannot reasonably bear. The other decision on which the learned Advocate-General, for the appellants, relied was a decision of a Divisional Bench of the Madras High Court: 6 M. L. W. 568.³ The observation made in that decision, which again was largely obiter dictum, was that "R. 102 . . . lays down that nothing in R. 101 shall be applicable to a transferee lite pendente." It is to be observed that the sale in that case was a sale in execution of a mortgage and not a money decree. Now, although at such a sale the property of the judgment-debtor is sold by the Court against his will or without his consent, it has to be remembered that when he executed the original mortgage he voluntarily transferred an interest in the property. I doubt myself if the expression 'property' in R. 102 can be construed as meaning "an interest in the property" but the point is perhaps arguable. The learned District Judge was, therefore, in my opinion, correct in relying, as he did, on the decision of Fazl Ali J., as he then was, and dismissing the application under O. 21, R. 99. In that view of the matter, this appeal is not maintainable and must be dismissed with costs. It is, however, desirable that I should deal briefly with an argument which was strongly pressed by the learned Advocate-General for the appellants. The learned Advocate-General contended that the respondent was a representative of the judgment-debtor and that, in consequence, the learned District Judge should have dealt with the application as if it had been application under S. 47 of the Code. I do not doubt that it would have been open to the appellants to make an application under S. 47, and if they had done so, it would have been for the learned District Judge to determine whether or not the respondent was the representative of the judgment-debtor Goona Seethayamma.

The learned Advocate-General invited us to say that the respondent was in fact her representative and was bound by the decree in the partition suit. Speaking for myself, however, I think the matter is by no means free from doubt, and that in any case we are not in a position to determine it when neither the pleadings in the partition suit nor the issues which were raised are before us. As this appeal is not maintainable, we also cannot direct the learned District Judge to treat the application as if it was an appli-

cation under S. 47 of the Code unless we act in exercise of our revisional jurisdiction. I can see no good reason for taking so unusual a course. The contention of the respondent is apparently that the property which he purchased in execution of his decree against Goona Seethayamma was her stridhan property and was not part of the property of the joint family and was, therefore, not liable to be partitioned. The appellants to whom that property has been allotted at the partition can institute a suit asking for a declaration of their title and for recovery of possession. If such a suit is instituted, it will not, I imagine, be open to the respondent to contend that the suit is barred inasmuch as an application could and ought to have been made to the Court executing the decree in the partition suit under S. 47. In this connection, I may be permitted to refer to a decision of a Divisional Bench of the Bombay High Court which appears to me to be directly in point: 52 Bom. 208.⁴ The hearing fee is assessed at two gold mohurs.

Pande J. — I agree that the appeal should be dismissed.

D.S./D.H.

Appeal dismissed.

4. ('28) 15 A. I. R. 1928 Bom. 65 : 52 Bom. 208: 108 I. C. 17, Basappa Budappa v. Bhimangowda Shiddangowda.

[Case No. 58.]

A. I. R. (33) 1946 Patna 136

SHEARER AND PANDE JJ.

L. Jagga Rao and another
Petitioners

v.

Emperor.

Criminal Revn. Nos. 199 and 217 of 1944, (Cuttaek) Decided on 27th August 1945, from order of Sessions Judge, Ganjam-Puri, Berhampore, D/- 14th September 1944.

(a) Orissa Food Grains (Control and Movements and Transactions) Order (1943), Rule 4— Interpretation of—Sale includes exchange — Exchange of paddy above prescribed limit for quantity of sugar—R. 4 is contravened—Offence under R. 81 (4), Defence of India Rules, is committed.

The Orissa Food Grains (Control and Movements and Transactions) Order, as its title indicates, was made to control movements of and transactions in food grains to meet a special circumstance in the Province arising out of the War. A reference to the provisions of Indian Sale of Goods Act which was enacted to provide for transactions falling within its scope is not permissible to construe the provisions of the Order. [P 137 C 2]

The words 'purchase' and 'sale' in Rule 4 of the Order must, in the absence of any definition in the Order, be understood in their plain dictionary meaning, according to which the

3. ('18) 5 A. I. R. 1918 Mad. 673 : 42 I. C. 523 : 6 M. L. W. 568, Kanakasabhai Mudaliar v. Rajagopal Naidu.

word 'sale' means the action or an act of selling or making over to another for price, the exchange of a commodity for money or other *equivalent consideration* (and not for money consideration only as under the Sale of Goods Act). Thus, an exchange of paddy above the prescribed limit for an equivalent consideration in the shape of sugar will be covered by the prohibition contained in the rule and the parties to such a transaction will be guilty of an offence under R. 81 (4), Defence of India Rules. [P 137 C 2]

(b) Interpretation of statutes — Words of statute clear and unambiguous — Natural and ordinary sense is to be given.

A statute is to be expounded 'according to the intent of them that made it.' If the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense.

[P 137 C 2]

R. K. Ratho — for Petitioners.

Advocate-General — for the Crown.

Pande J. — The petitioner L. Jagga Rao in Criminal Revision No. 199 of 1944 and Bira Sahu, petitioner in Criminal Revision No. 217 of 1944, residing at Aska town, the former is the Manager of a Sugar Factory at Aska and the latter is a hotel keeper at the same place. Bira Sahu supplied nine bharanams (about forty maunds) of paddy to the Manager of the Sugar Factory who, in exchange thereof, gave eight bags of sugar to Bira Sahu and a further sum of Rs. 28 was to be paid to him later. On the report of the Supervisor of Supplies both of them were prosecuted for having contravened the provisions of Rule 4, Orissa Food Grains (Control and Movements and Transactions) Order, 1943. On trial, a First Class Magistrate of Russelkonda convicted both the petitioners under R. 81 (4) of the Defence of India Rules, and sentenced them to a fine of Rupees 300 each, in default, rigorous imprisonment for three months each. On appeal, the Sessions Judge of Ganjam Puri affirmed the convictions but modified the sentence by reducing the fine to Rs. 50 each, in default, rigorous imprisonment for fifteen days each.

It has been urged for the petitioners that the prohibitions provided by R. 4, Orissa Food Grains Order have no application to the transactions between the parties and so the convictions of the petitioners are bad in law and should be set aside. It is argued that the said rule prohibits transactions of purchase and sale of foodgrains exceeding two standard maunds, whereas the transaction in question was merely exchange of goods, for there was no money consideration for the goods supplied by one party to the other. In support of the argument reference is made to S. 4 (1) and

cl. (10) of S. 2, Sale of Goods Act, 1930 (Act 3 [III] of 1930). Section 4 (1) provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Section 2 (10) defines the word 'price' to mean the money consideration for a sale of goods. In my opinion, reference to the provisions of the Indian Sale of Goods Act for interpretation of the said rules in the Orissa Food Grains Order does not seem to be relevant. That Act was enacted to provide for transactions which fall within its scope. The Orissa Food Grains Order, as its title (stated above) indicates, was made to control movements of and transactions in food grains to meet a special circumstance in the province arising out of the war. The fundamental rule of interpretation of statute is that it is to be expounded "according to the intent of them that made it." If the words of a statute are themselves precise and unambiguous (*sic-unambiguous*), no more is necessary than to expound those words in their natural and ordinary sense. Here the intention of the authority who made the Food Grains Order, as I have already said, is clearly indicated by the title of the Order itself. The word sale, purchase or price is not defined in the Order to bear any special meaning. Therefore, the words 'sale' and 'purchase' in Rule 4 of the Order must be understood in their plain dictionary meaning. In Oxford Dictionary the word 'sale' is stated to mean the action or an act of selling or making over to another for price, the exchange of a commodity for money or other equivalent consideration. The word 'price' means the money or other equivalent for which anything is bought or sold. Therefore, according to the plain dictionary meaning of the relevant words, the transaction in question is clearly covered by the prohibitions prescribed by R. 4 of the said Order.

It also appears from the evidence that money value was the consideration for the goods supplied by one party to the other. In the account books of the Sugar Factory, the transaction is entered as a sale of sugar. Eight bags of sugar were valued at Rs. 212 and nine bharans of paddy at Rs. 240. The difference of Rs. 28 was to be paid later by the Factory Manager, Bira Sahu. It is thus clear that the parties entered into the transactions as sale and purchase of the goods supplied by one to the other. Our attention was drawn to 30 Cal. 921¹ in support of the contention that the transaction in ques-

1. (1933) 30 Cal. 921, *Kedarnath Saha v. Emperor*.

tion was merely an exchange and not a sale. The facts of that case are entirely different. In that case a muktear who had purchased a court-fee stamp for his client transferred it to another client, the latter having agreed to return to the muktear another court-fee of the same value, and was convicted of an offence under S. 34, Court-fees Act. It was found that the muktear never sold the stamp at all. He transferred it to another person and was going to take another stamp in exchange but there was no sale. Accordingly the conviction was set aside. In that case there was no exchange of one kind of goods for another variety, nor there was anything to show that the exchange was in consideration of money or valuable equivalent thereof. Therefore that case has no application to the facts of the present case. In my opinion, there is no substance in the contention that the transaction does not fall within the prohibitions of R. 4, Orissa Food Grains Order. I would accordingly discharge the rule and dismiss the petitions.

Shearer J. — I entirely agree.

K.S /D.H. *Revisions dismissed.*

[Case No. 59.]

A. I. R. (33) 1946 Patna 138

SINHA AND PANDE JJ.

Prabhu Missir — Plaintiff —
Appellant

v.

Dome Mahto — Defendant —
Respondent.

Appeal No. 926 of 1943, Decided on 23rd April 1945, from appellate decree of Sub-Judge, Shahabad, D/- 27th May 1943.

(a) Bihar Tenancy Act (8 [VIII] of 1885), Ss. 29 and 112 A—Holding not subject of suit—Rent increased by compromise in suit—Enhancement is one under S. 29 and can be cancelled.

In a suit for declaration that an entry in the record of rights in respect of a holding was incorrect a compromise was entered into by which the rent of a certain other holding which was not the subject matter of the suit was also increased and a decree was passed in terms thereof :

Held that the agreement so far as the other holding was concerned could not be said to be a part of the consideration for the settlement of dispute in the suit. The increase in rent should, therefore, be treated as an enhancement by contract within S. 29 of the Act, and the Rent Reduction Officer could cancel it under S. 112 A. [P 139 C 2]

(b) Bihar Tenancy Act (8 [VIII] of 1885), Ss. 29 and 112A—Whether increase in rent is enhancement under S. 29 is question of fact or mixed question of fact and law to be determined by Rent Reduction Officer—Decision of such officer that increase is enhancement

within S. 29 though erroneous is not without jurisdiction.

Whether the increase in rent of a holding is an enhancement under S. 29 is a question of fact or perhaps a mixed question of fact and law to be determined by the authority vested with power under the statute to cancel enhancement under the provision of clause (a) of sub-section (1) of section 112A : ('29) 16 A.I.R. 1929 Pat. 568 (F.B.), *Ref.* [P 139 C 2]

Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. Hence the decision of the Rent Reduction Officer, that the increase in rent of a particular holding is an enhancement within S. 29 even if it be assumed to be erroneous, cannot be said to be without jurisdiction: 25 Bom. 337 (P.C.) and ('21) 8 A.I.R. 1921 Cal. 34 (F.B.), *Rel. on.* [P 140 C 1]

Rai I. B. Saran — for Appellant.

C. P. Das and Shambhunath—for Respondent.

Pande J. — This is an appeal from a decree dated 27th May 1943 of the Subordinate Judge, Second Court, Shahabad, which reversed the decree dated 5th May 1942 of the Munsif, Second Court, Arrah, in an action for a declaration that the orders of the Rent Reduction Officer were without jurisdiction. The suit giving rise to the present appeal relates to two occupancy holdings bearing khata Nos. 482 and 488 in village Kutchri within *milki lakheraj* tenure of the plaintiff. Both the holdings were recorded as occupancy *raiya* *jote* of the defendant. Khata No. 482 having an area of 4.26 acre at an annual rent of Rs. 19-6-6 was recorded under khewat No. 1/2 of which the plaintiff was the recorded tenure-holder. Khata No. 488 having an area of 3.50 acre at an annual rent of Rs. 14-8-6 was recorded under khewat No. 1/6 of which Mt. Vidya Kuer widow of Bashisht Missir was the recorded tenure-holder. Mt. Vidya Kuer died in the year 1348 and her interest in the tenure has devolved upon the plaintiff as reversionary heir of her husband. The record of rights was published in the month of February 1912. The plaintiff instituted a suit against the father of the present defendant in the Court of Munsif, Arrah, which was registered as Suit No. 260 of 1913 for a declaration that the entry in the record of rights in respect of khata No. 482 was incorrect. He claimed that the land was his *zirat* and had been in his khas cultivation and that the defendant had no concern whatever with that holding. The suit was decreed on compromise on 14th April 1914. By the compromise the holding was recognised to be occupancy *raiya* holding of the defendant.

The recorded jama was, however, increased from Rs. 19-6-6 besides cess to Rs. 34-15-0 inclusive of cess. It was also agreed that the arrear rent for the period 1318 to 1320 amounting to Rs. 104-13-0 will be paid in two instalments as specified in the petition of compromise. There was no suit in respect of khata No. 488. But by the compromise petition it was also agreed that the defendant who was in possession of the holding would continue to hold it as occupancy *raiya*. In this case also the jama was increased from 14-8-6 besides cess to Rs. 25-8-6 inclusive of cess.

In the year 1937, S. 112A was enacted by the Bihar Tenancy (Amendment) Act, 1937. Clause (a), sub-s. 1 of S. 112A provides that the Collector may cancel all enhancement of rents of occupancy holdings made under S. 29 or under clause (a), (b) or (d) of S. 30 between 1st January 1911 and 31st December 1936. The defendant made an application to the Collector for cancellation of the aforesaid increase in rents of the two holdings alleging that the increase in rent was really an enhancement under S. 29, Bihar Tenancy Act. The Rent Reduction Officer who was appointed by the Provincial Government to discharge the functions of the Collector under S. 112A accepting the contention of the defendant treated the increased rents as an enhancement under S. 29, Bihar Tenancy Act, and by his order dated 4th April 1939 cancelled the enhancements. The plaintiff instituted the suit against the order of the Rent Reduction Officer which is said to be without jurisdiction and therefore inoperative. The lower Court decreed the suit. On appeal the decree of the first Court was reversed by the Subordinate Judge and the suit was dismissed. The plaintiff has preferred this appeal. The only point that arises for determination is whether the order of the Rent Reduction Officer was without jurisdiction. It has been urged that the rents fixed by the compromise were in settlement of a bona fide dispute regarding rights of the properties to the land in suit and therefore the rents settled by the compromise can in no sense be treated as an enhancement under S. 29, Bihar Tenancy Act.

An examination of the record discloses a material point which does not appear to have been noticed in the Courts below. The suit in which the compromise was entered was in regard to Khata No. 482 only which falls within the tenure of the plaintiff. There is no evidence that a similar suit was instituted in regard to Khata No. 488 also which

falls under a different tenure of which Mt. Vidya Kuer was the recorded tenure-holder at the time. Therefore the agreement between the plaintiff and the defendant in regard to that holding as embodied in the compromise petition cannot in any sense be said to be a part of the consideration of the settlement of the dispute in that suit. In fact there is nothing to show that the correctness of the entry in the record of rights in regard to that khata was at all challenged by the suit. That being the position, the agreement and the compromise petition in regard to increase in the rent of this holding may reasonably be treated as an enhancement by contract between the plaintiff and the defendant. Mt. Vidya Kuer's interest has, no doubt, on her death devolved upon the plaintiff. But that does not in any way affect the legal position in regard to the agreement between the parties in respect of Khata No. 488. I am, therefore, of opinion that the Rent Reduction Officer was perfectly justified in treating the increased rent of this holding under the compromise as an enhancement under S. 29 and in cancelling that enhancement under the provision of S. 112A (1) (a), Bihar Tenancy Act.

There remains the question regarding the other holding, Khata No. 482. The learned advocate in support of his argument referred to the Full Bench decision in 10 P. L. T. 717.¹ That case is an authority for the proposition that an agreement which is by way of bona fide settlement of dispute does not come within the mischief of S. 29, Bihar Tenancy Act. But the question whether the increase in rent of the holding in question was an enhancement under S. 29 is a question of fact or perhaps a mixed question of fact and law, to be determined by the authority vested with power under the statute to cancel enhancement under the provision of cl. (a) of sub-s. (1) of S. 112A.

The expression "jurisdiction" has been variously defined in books and reported cases. It seems sufficient to state here that the expression means

"the power or authority which is conferred upon a Court by the Legislature to hear and determine cases between parties and to carry the judgment into effect; the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution."

It is not disputed that the Rent Reduction Officer had the territorial jurisdiction to decide the case in question. It is also not

1. (29) 16 A. I. R. 1929 Pat. 568 : 9 Pat. 527:118 I. C. 723 : 10 P.L.T. 717 (F.B.), Askaran Baid v. Deolal Singh.

disputed that he had jurisdiction over the subject-matter of the case. All that is said is that the Court took an erroneous view of the increase in rent as fixed by the compromise decree in treating it as an enhancement under S. 29, Bihar Tenancy Act. In the decision of the Full Bench case in 48 Cal. 138² his Lordship Mookerjee, Acting C. J., pointed out :

"Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly."

As an authority for this proposition reference may be made to the celebrated dictum of Lord Hobhouse in 27 I. A. 216³ :

"A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed."

In view of the above principle of law laid down by high authorities the decision of the Rent Reduction Officer, even if it be assumed to be erroneous, cannot be said to be without jurisdiction. The same principle will apply to the case of the other holding bearing Khata No. 488, if it be assumed, though I see no justification for it, that the rent fixed for that holding also formed part of consideration of the settlement of the dispute in the suit relating to Khata No. 482. For the above reasons it must be held that the decision of the lower appellate Court is perfectly correct and cannot be disturbed. I would, accordingly, dismiss the appeal with cost.

Sinha J. — I agree.

K.S./D.H.

Appeal dismissed.

2. ('21) 8 A. I. R. 1921 Cal. 34 : 48 Cal. 138 : 58 I.C. 806 (F.B.), *Hriday Nath Roy v. Ram Chandra*.
3. ('01) 25 Bom. 337 : 27 I. A. 216 : 7 Sar. 739 (P. C.), *Malkarjan v. Narhari*.

[*Case No. 60.*]

A. I. R. (33) 1946 Patna 140

DAS J.

T. Gurumurty Patro—Petitioner
v.

Emperor.

Criminal Revn. No. 3 of 1945, (Cuttack) Decided on 1st May 1945, from order of Sub-divisional Magistrate, Balliguda, D/- 24th October 1944.

(a) Madras Forest Act (5 [V] of 1882), S. 26 (c)—Rules under, requiring permit for removal of forest produce — Accused acquiring forest produce in area where Act does not apply — Produce brought without permit in area where Act applies — Accused is not guilty of contravening rules.

Where an accused person acquires forest produce (Mahua flowers) in an area where the Madras Forest Act does not apply and where the removal of forest produce does not require any special permit under the rules made under S. 26 (c), he cannot be found guilty of contravening the rules merely because he has brought the produce without a permit into an area where that Act is in force. The real question is from which area the forest produce was acquired. [P 141 C 1].

(b) Criminal trial—Onus of proof—Onus is always on prosecution.

The onus in a criminal case is always on the prosecution, and it is for the prosecution to prove that the accused has committed the offence with which he is charged. It is not for the accused to prove his innocence. [P 140 C 2].

Cr. P. C. —

('41) Chitaley, S. 367, N. 6, pt. 1a.

P. C. Chatterji—for Petitioner.

Advocate-General—for the Crown.

Order. — The petitioner has been found guilty of contravening the rules made under S. 26 (c), Madras Forest Act, and he has been sentenced to a fine of Rs. 50 only. The case against the petitioner was that on 17th August 1943, he was removing 8 cart-loads of mahua flowers without a permit from the Balliguda division, where the Madras Forest Act is in force. The defence of the petitioner was that he had purchased the 8 cart-loads of mahua flowers from one Basudeo Pradhan, who had a permit for the Khondmals area, in which area the Madras Forest Act did not apply and no permit was necessary for removing forest produce. The petitioner examined certain witnesses in support of his defence.

The Court of appeal below has proceeded on the assumption that it was for the petitioner to prove his innocence. The Court of appeal below states that "it is the duty of the accused to prove that the commodity comes from an area in which a permit for transportation is not necessary." In this view, the Court of appeal below is certainly wrong. The onus in a criminal case is always on the prosecution, and it was for the prosecution to prove that the petitioner had committed the offence with which he was charged. The petitioner had given satisfactory evidence in support of his contention that he had purchased mahua flowers from an area in which no permit for transportation was necessary. The trial Court appears to have accepted that contention of the petitioner, but proceeded on the footing that as soon as the forest produce was brought in the Balliguda division, a permit was necessary by virtue of the rules made under the Madras Forest Act. The trial Court is clearly wrong in this respect. If no permit was

necessary for removing mahua flowers plucked from the Khondmals area, the petitioner cannot be found guilty merely because he had brought the mahua flowers into an area, where the Madras Forest Act is in force. The real question is from which area mahua flowers were plucked. As I have stated above, the petitioner has given good evidence to show that the mahua flowers have been acquired in an area, where the Madras Forest Act did not apply, and where the removal of forest produce did not require any special permit. In my opinion, the petitioner is clearly entitled to an acquittal. The result, therefore, is that the application is allowed, and the conviction and sentence passed against the petitioner are set aside. The fine, if paid, should be refunded to the petitioner. It is needless to say that the order of confiscation is also set aside, inasmuch as the petitioner has committed no offence under the Madras Forest Act.

V.R./D.H.

Revision allowed.

[Case No. 61.]

A. I. R. (33) 1946 Patna 141

FAZL ALI C. J. AND MANOHAR LALL J.

*Indo Swiss Trading Co., Ltd. —**Appellant*

v.

Hemendra Lal Roy — Respondent.

Appln. No. 1 of 1944, Decided on 6th August 1945, for leave to appeal to His Majesty in Council, *From appeal reported in ('45) 32 A. I. R. 1945 Pat. 483.*

Letters Patent (Pat.), Cl. 31—Final judgment or order — Restitution order in summary proceeding is not final order — Civil P. C. (1908), S. 109 (a).

A restitution order passed in a summary proceeding under S. 185, Companies Act, does not determine the rights of the parties finally and so is not a "final order or judgment" within the meaning of Cl. 31, Letters Patent (Patna): ('20) 7 A.I.R. 1920 P. C. 86 and ('33) 20 A. I. R. 1933 P. C. 58, *Rel. on.* [P 142 C 1]

C. P. C. —

('44) Chitale, S. 109 N. 4.

('41) Mulla, Page 387 "Final order."

N. N. Sen — for Appellant.

G. C. Mukherjee — for Respondent.

Order.—This is an application for leave to appeal from an order of this Court in a restitution proceeding. The order was made in the following circumstances: On 20th August 1935, there was an order by a single Judge of this Court for the winding up of the Giridih Electric Supply Co., but when the Official Liquidator tried to take possession of assets of the company, there was resistance on behalf of the respondents 1 to 3 whereupon the Official Liquidator applied

to this Court for an order under S. 185, Companies Act, directing that he should be put in possession of the undertaking. On 5th January 1940, the learned Judge ordered the respondents to deliver possession of the assets and property of the company to the Official Liquidator and the possession of the properties was subsequently delivered to him in accordance with that order. The respondents then preferred an appeal against the order of the learned Judge. This appeal succeeded, the appellate Court holding that the application under S. 185, Companies Act, was not maintainable and "the Official Liquidator must proceed by way of a regular suit and not by way of these summary proceedings." Thereafter, the respondents made an application to the learned Judge, who deals with cases under the Company law, for an order for restitution, but that application was disallowed by him. The respondents then preferred an appeal and that appeal has been allowed and the order of the learned Company Law Judge has been set aside. The effective part of the order of the appellate Court against which the applicants propose to appeal runs as follows:

"The position, therefore, is this: the Court of first instance said that possession should be given in the summary proceeding, whereas the appellate Court said 'possession could be taken only by means of a suit.' The Official Liquidator came into possession in execution of the order of the Court of first instance and to maintain his possession thus obtained would be to nullify the order of the appellate Court. The law requires that the order of the appellate Court must be given effect to by the Court of first instance. In this view the order now under appeal is opposed to law and must be set aside."

* * * *

In the circumstances restitution must be allowed but subject to this condition which is necessary to impose for the ends of justice that the delivery of possession to the appellants will be postponed for three months from this date to enable the respondent to bring a suit, if so advised, and obtain such relief as may be open to him in law."

The first question to be determined by us is whether the order against which the applicants propose to appeal to His Majesty in Council is a final judgment or order in the sense in which these expressions have been used in paragraph 31 of the Letters Patent of this High Court. In one sense it is a final order because the restitution proceedings are now closed and restitution has been ordered, but the Judicial Committee of the Privy Council have considered the meaning of the expression "final orders" in several cases and they have laid down the test that the final order must be one which finally determines

the rights of the parties and, therefore, an order cannot be said to be final unless it finally disposes of the rights of the parties: see 47 I. A. 124¹ and 60 I. A. 76.² In the present case, the restitution order was passed in a summary proceeding and the rights of the parties have not been finally determined thereby. The order of this Court upon which the restitution proceedings were started clearly states that the rights of the parties could not be decided in a summary proceeding and could be decided only by means of a suit. A suit, we understand, has been instituted and the final rights of the parties to the properties can be determined only in that suit. In this view, though the question before us appears at the first sight to be not easy, we are inclined to hold that the order against which the appellants propose to appeal is not a final order or judgment. In these circumstances leave to appeal is refused, and the application is dismissed with costs. Hearing fee one gold mohur.

V.W./V. B. *Application dismissed.*

1. (20) 7 A. I. R. 1920 P. C. 86 : 47 Cal. 918 : 47 I. A. 124 : 14 S. L. R. 191 : 56 I. C. 302 (P. C.), *Ramchand Manjimal v. Goverdhandas Vishindas*.
2. (33) 20 A. I. R. 1933 P. C. 58 : 11 Rang. 58 : 60 I. A. 76 : 142 I. C. 328 (P. C.) *Abdul Rahman, v. D. K. Cassim & Sons*.

[Case No. 62.]

A. I. R. (33) 1946 Patna 142

VARMA J.

Tetar Mahton — Appellant

v.

Ram Babu and others — Respondents.

Appeal No. 379 of 1943, Decided on 20th April 1944, from appellate decree of Addl. Sub-Judge, Patna, D/-22nd February 1943.

Bihar Tenancy Act (8 [VIII] of 1885), Ss. 112A and 115—Rent reduction proceedings — Landlord not made party — No notice served — Order reducing rent is ultra vires.

The landlord was not made a party to the rent reduction proceedings under S. 112A. No notice of the proceedings was served on him and the proceedings were started within a month of the general notification :

Held that the order reducing rent was *ultra vires*. [P 142 C 2; P 143 C 1]

K. N. Lal — for Appellant.

G. N. Sahai and G. C. Banerji —

for Respondents.

Judgment. — The defendant is the appellant in this case. The suit was for arrears of rent for the years 1346 to 1348 Fasli. The rate of rental demanded was Rs. 119-9-0 per annum. Out of the total, the defendant was given credit for a sum of Rs. 268-12-6. The plaintiffs contended that they were not

aware of the proceedings under S. 112A, Bihar Tenancy Act, and, therefore, they were not bound by the reduction made thereunder. The defendant relied naturally upon the reduction and tried to show that the plaintiffs had knowledge, and they were bound by the orders of the Rent Reduction Officer. The trial Court accepted the contention of the defendant and held that the payment of Rs. 268-12-6 covered the whole of the amount due from the defendant and, therefore, he dismissed the suit of the plaintiffs. On appeal, the lower appellate Court held, accepting the contention of the plaintiffs, that the reduction made by the Rent Reduction Officer was without jurisdiction. That being so, the plaintiffs were entitled to a decree as prayed for in the plaint.

Mr. K. N. Lal appearing on behalf of the appellant has divided his argument in three parts : That the lower appellate Court was wrong in thinking that the reduction was due to the previous enhancement; that the lower appellate Court was not justified in holding that the reduction was ultra vires for want of notice to the plaintiffs or their predecessor; and that he made an error in saying that the proceedings before the Rent Reduction Officer were taken up before a month had expired from the date of the notice. As I read the judgment of the lower appellate Court, I find that the lower appellate Court has set out his reasons for holding that the proceedings before the Rent Reduction Officer were ultra vires. He points out that Gobind Lal Mahto was the father of the original plaintiff who died in 1928 or 1929, and the present proceedings started in 1937. Even then in the proceedings before the Rent Reduction Officer the name of Gobind Lal continued and, therefore, he accepted the contention of the plaintiff that he was not a party before the Rent Reduction Officer. Then he also refers to the fact that the notices that were required under the rules framed under S. 115, and also under S. 112A, Bihar Tenancy Act, have to be issued in a certain manner and must be issued at certain time before the proceedings actually commenced. He refers to the various orders in the order-sheet and with regard to one particular order he says:

"In this order 2, dated 20th December 1937, there is no note to indicate that the aforesaid general notice which was ordered to be issued as per order 1, dated 27th November 1937, was actually issued and duly served and that being so, and the plaintiff, that is, the original plaintiff, Sita Ram, being not made a party in the rent reduction proceeding, the plaintiff's version that he had no knowledge of the rent reduction proceeding and

no notice of the rent reduction proceeding was served on him, should, I think, be accepted to be true and consequently, in view of the decision of our own High Court in A. I. R. 1942 Pat. 258,¹ the order of the rent reduction officer reducing the jama of the rent claimed holding should, I think, be held to be ultra vires and without jurisdiction."

He also goes on to point out that the proceedings were started within a month of the notice, whereas at least a clear month should be allowed between the notice and the initiation of the proceedings for reduction of rent. Mr. K. N. Lal has tried to argue that once the general notification has been issued, it is the duty of every landlord to appear before the Rent Reduction Officer, and there are indications on the record to show that there was a general notification by the Local Government and the local authorities proclaimed it. This line of reasoning loses sight of the fact that the lower appellate Court is emphasising the fact that the original plaintiff was never a party to the rent reduction proceedings and was not under a misapprehension that the Rent Reduction Officer reduced the rent on account of previous enhancement. But that is a question of fact on which I am not in a position to express any view at all and in any case it is a trivial matter which does not affect the main question that the order of the Rent Reduction Officer was ultra vires. This line of argument is mentioned in lower Court's judgment only as a supplementary ground for interfering with the order of the Rent Reduction Officer after having already held that the order was ultra vires. As the points urged by Mr. K. N. Lal fail, the appeal must be dismissed with costs. Leave to appeal under the Letters Patent is refused.

G.N.

Appeal dismissed.

1. ('42) 29 A. I. R. 1942 Pat. 258 : 199 I. C. 222, Nandkishore Lal v. Basudeo Singh.

[Case No. 63]

A. I. R. (33) 1946 Patna 143**MANOHAR LALL AND DAS JJ.**

Kamakshya Narain Singh — Plaintiff
— Appellant

v.

Arjun Lal Agarwala and another —
Defendants — Respondents.

Appeal No. 43 of 1942, Decided on 8th May 1945, from original decree of Sub-Judge, Hazaribagh, D/- 18th December 1941.

(a) Bengal Cess Act (9 [IX] of 1880), Ss. 6 and 80 — Coal mines — Royalties—Road cess upon royalties received by proprietor is a tax upon mines and is recoverable from lessees.

The relevant terms of a coal mining lease on which a claim for the reimbursement of cess,

income-tax and interest paid by the proprietor was based were: "The lessees will during the continuance of this lease duly pay to the Rajahs the royalties...clear of all deductions whatsoever...and will also pay all government and other cesses, taxes and other impositions ... assessed or imposed on the said coal fields":

Held that upon a proper construction of the terms of this lease, and also in view of the language of the charging sections in the Cess Act where the words "not annual profits" refer to the property and not to the individual, the lessees were bound to pay the cess upon the royalties received by the proprietor of the mines from them: 34 Cal. 257 ; 38 Cal 372 (P.C.) and ('38) 25 A.I.R. 1938 P. C. 243, *Rel. on.* [P 145 C 1]

Held further that the proprietor could not claim any reimbursement for the income-tax and interest on the cess: 38 Cal. 372 (P.C.), *Foll.*

[P 148 C 1]

(b) Bengal Cess Act (9 [IX] of 1880) as amended by Bihar Act (2 [II] of 1936), Ss. 72 and 81 — Amendment in 1936 has made no difference in application of principles in 38 Cal. 372 (P. C.).

The amendment of Cess Act in 1936 does not make any change in the mode of assessment of cess so as to disentitle the owner of the mine to be reimbursed from the lessee thereof, for the cess which had been irregularly though not illegally recovered from the owner by the Collector. The amendment of the Cess Act in 1936, has made no difference whatsoever to the application of the principles enunciated in 38 Cal. 372 (P. C.).

[P 145 C 2 ; P 147 C 1]

(c) Bengal Court of Wards Act (9 [IX] of 1879), S. 18 — Court of Wards omitting to recover dues to ward without considering whether such omission was for benefit of ward or estate—Ward not bound by such omission.

Where the Court of Wards simply refrained from demanding the cess on royalties which was due to the ward without deciding the question *bona fide* whether such refraining from demanding was beneficial to the ward or to his estate:

Held that the ward was not bound by the act of the Court of Wards under S. 18 and the ward after he came of age and took possession could recover the cess if the claim was in limitation : 23 All. 394 (P. C.) and ('29) 16 A.I.R. 1929 Pat 369, *Disting.*; (1826) 130 E. R. 671, *Expl.* [P 149 C 2]

L. K. Jha and Shambhu Prasad Singh —
for Appellant.

S. N. Basu and S. Mustafi — for Respondents.

Manohar Lall J.—This appeal by the plaintiff—the present proprietor of the Ramgarh Raj—arises out of an action for reimbursement for the amounts of cess, income-tax and interest paid by the appellant and which he claims in accordance with the stipulations in a coal mining lease from his lessees and their transferees. The principal question for determination is whether upon a true construction of the relevant terms of the lease the defendants are liable to pay cess on the royalties received by the lessors. The defendants also challenged the correctness and legality of the assessment of cess made by the assessing authorities which

they say was in violation of the provisions of the Cess Act and the amended Bihar Act, and, therefore, suggest that the payments made by the plaintiff were voluntary. There is also a cross appeal by the defendants. On 28th July 1908, the grandfather of the plaintiff granted a coal mining lease with respect to 1000 bighas of land in village Sijuwa to Bokaro Jharia Coal Fields Limited for a period of 999 years. This company transferred their right, title and interest in 384 bighas out of these lands in favour of defendant 1 on 24th January 1921. This transfer was recognised by the Manager of the Ramgarh Raj, which was then under the Court of Wards. The transferee agreed to pay to the Ramgarh Raj royalty for all coals despatched from this area and also to be bound by the terms and conditions of the indenture of 1908. Defendant 1 sold his right, title and interest to defendant 2, Gunendra Nath Rai, on 22nd August 1928, and defendant 2 in his turn sold his purchased rights to defendants 3 and 4 on 6th January 1931.

The plaintiff's case was that after the death of his grandfather the Ramgarh estate was taken charge of by the Court of Wards and was released on 10th August 1937, upon his attaining majority. For some reason or another, the Court of Wards did not realise from the defendants any cess and income-tax which were assessed and imposed upon or in respect of the above 384 bighas of land and which the Court of Wards had to pay. The plaintiff, therefore, instituted the suit on 8th December 1939, to be reimbursed on account of the cess and income-tax which had been paid by the Court of Wards and by the plaintiff since 1937, and which the defendants were liable to pay. He also claimed interest on these sums. In a tabular statement printed at page 5 an account of the cess income-tax and interest for a number of years is shown as due from the defendants. The plaintiff compromised the suit with defendants 1 and 2. As defendants 3 and 4 came on the scene on 6th January 1931, they would have been liable from that date were it not that these defendants had admitted in their written statement that they took possession from 30th June 1930, that is, just over six months before the date of the assignment in their favour. The claim of the plaintiff, therefore, from the year 1922-23 right up to 1929-30 was no longer in subject of controversy after the compromise. The controversy is confined only to the years 1930-31 up to 1937-38.

The defence of the contesting defendant was that upon a proper construction of the indenture of 1908 the claim of the plaintiff for road cess and income-tax was not maintainable. They denied that the plaintiff or the Court of Wards ever paid any cess or imposition in respect of the disputed property, and further, that if the plaintiff was assessed with assessment it had nothing to do with the coal land in question upon which no assessment was ever made. The further material defence was that the Court of Wards have granted receipts to these defendants for all the dues of the estate from time to time, with the result that the payment to the Court of Wards which had full statutory power to act for and represent the estate of the plaintiff operated as full discharge and acquittance of the defendants' liability, and that if the Court of Wards, upon a mistaken view of the law, namely, of their rights to demand cess from the defendants, failed to do so, the plaintiff now cannot recover those sums. The same objection was taken with regard to the period when the plaintiff came in possession after the release of the estate from the Court of Wards. The learned Subordinate Judge in a careful judgment has decided the questions thus agitated between the parties partly in favour of the plaintiff and partly in favour of the defendants and after examining the various provisions of the Cess Act disallowed the claim of the plaintiff with regard to the years 1930-31, 1931-32 and 1932-33 upon the ground that there were no materials to find out the actual amount of cess which was, upon assessment in accordance with law, paid on behalf of the plaintiff in those years. But he allowed the claim of the plaintiff for the years 1933-34, 1934-35 and 1935-36 because there were materials available for finding out the proper assessment for those years, and the office was directed to work out the rate of cess which should be treated as imposed upon the plaintiff for 1935-36. The learned Subordinate Judge also disallowed the claim for 1936-37 and 1937-38 because, in his view the assessment for cess for these years was not in accordance with law, and therefore, the payment by the plaintiff was a voluntary payment. The learned Subordinate Judge disallowed the claim for income-tax and also for interest. He overruled the defence contention that payment to the Court of Wards amounts to a full discharge of the claim of the plaintiff. Hence the appeal by the plaintiff with regard to the items of the income-tax and interest and also with regard to the claim for

cess for the years 1930-31, 1931-32, 1932-33, 1936-37 and 1937-38 disallowed by the Subordinate Judge. The defendants, on the other hand, have preferred a cross-appeal with regard to the claim allowed in part for the years 1933-34, 1934-35 and 1935-36.

We have heard elaborate, interesting and able arguments by Mr. L. K. Jha on behalf of the appellant and by Mr. S. N. Basu on behalf of the respondents. But in my view the principal question is easy of solution. It is covered by a well-known decision of the Calcutta High Court in 34 Cal. 257¹ which was affirmed by the Privy Council in 38 I. A. 31,² and by the recent decision of the Privy Council in 65 I. A. 354.³ The relevant terms of the indenture dated 8th July 1908 must be reproduced here :

"The lessees will during the continuance of this lease duly pay to the Rajah the royalties hereby reserved or made payable at the time and in the manner aforesaid clear of all deductions whatsoever and shall take receipts for the same signed by the Rajah or his agent duly authorised in that behalf and such receipts shall alone be accepted as evidence of such payment and will also pay all Government and other cesses, taxes and other impositions which now are or may at any time hereafter during the continuance of this lease be assessed or imposed on the said coal fields . . ."

Similar terms have been interpreted in a number of decisions of the Calcutta High Court and this Court. They are quite familiar in coal mining leases in this and the neighbouring Province. In accordance with these decisions I must hold that defendants 3 and 4 are bound to pay road cess upon the royalties received by the plaintiff from them. Mr. S. N. Basu presented an elaborate argument in order to show that upon a proper construction of the terms of this lease it should be held that the cess which is taxed upon the plaintiff with regard to the royalties received is not a tax upon mines, and, therefore, the defendants are not liable to pay it, but the decisions already referred to negative this contention. The very language of the charging sections in the Cess Act, where the words "net annual profits" occur, has reference to the property and not to the individual : see 38 I. A. 31² at page 35.

The argument advanced by Mr. Basu was advanced before their Lordships of the Judicial Committee in 65 I. A. 354³ by Mr.

1. ('07) 34 Cal 257, *Manindra Chandra v. Secretary of State*.
2. ('11) 38 Cal 372 : 38 I. A. 31; 9 I. C. 311 (P. C.), *Manindra Chandra v. Secy. of state*.
3. ('38) 25 A. I. R. 1938 P. C. 243 : ILR (1938) 2 Cal 624 : 65 I. A. 354 : 176 I. C. 433 (P. C.), *Bengal Coal Co., Ltd. v. Janardan Kishore Lal Singh Deo*.

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Radcliffe, but the argument, though sought to be supported by a reference to the decision in (1882) 9 Q. B. D. 632,⁴ was negatived by their Lordships at page 363. Mr. Basu also argued that the terms of the particular lease in question should be construed with reference to its own terms and not with reference to the construction put by other Courts upon other, though similar, terms, and he relied upon the remarks of Jessel, Master of the Rolls, in (1875) 10 Ch. 394,⁵ at the foot of pages 396 and 397 onwards. It is sufficient to say that I am construing the very document itself unaided by any extraneous consideration. I do not see any special terms in this document which would require a different construction from that which has been placed by their Lordships on similar documents. Mr. Bose's argument with regard to the assessment after the Cess Act was amended has to be examined as it is contended that the amended provisions—which were not before their Lordships of the Judicial Committee in the cases referred to above—point to a different conclusion.

It will be useful to recall the scheme of taxation enjoined by the provisions of the old Cess Act for imposing a tax or cess from mines. By s. 6 local cess was directed to be assessed on the annual net profits from mines and quarries at the rate of one anna per rupee—this was the rate adopted in practice. By s. 72 the Collector of the district was directed to cause a notice to be served upon the owner, chief agents, manager or occupier of every mine or quarry in the form prescribed in Schedule E requiring such person to lodge in his office the return of the net annual profits of the mine or quarry on the average of the annual net profits thereof for the last three years for which the accounts have been made up. Provisions were made in the other sections in Chapter V for determining the value of the property and the annual net profits of the property (see Sections 76 and 79). Section 84 dealt with the case where the occupier of mine was a different person from the owner and had paid in excess of half the sum due as local cess. In that case the occupier was declared entitled to deduct the amount of the excess from the subsequent instalments of rent payable to his lessor. Similarly, where the owner had paid in excess over half such sum he was entitled to recover the amount of the excess from the occupier.

4. (1882) 9 Q. B. D. 632 : 47 L. T. 493 : 30 W. R. 930, *Allum v. Dickinson*.
5. (1875) 10 Ch. 394 : 44 L. J. Ch. 359 : 32 L. T. 415 : 23 W. R. 580, *Aspden v. Seddon*.

The form of the notice under Section 72, especially column 4, indicates that it is only the person in actual possession of mines who was required to submit the return, as obviously he is the person who can properly supply the details of the annual net profit on the average of the last three years. It was therefore, suggested in many cases decided under the old Act, and it was strenuously argued before us by Mr. S.N. Basu, that the only person who can be assessed to pay cess with regard to the profits of the mine is the occupier, the person who is in direct possession of the mine and works there, and in case the occupier is different from the owner, the owner cannot be assessed in law upon the royalties which he receives from the occupier. But in practice the Collector and the assesses both find it convenient and practicable to submit returns of the annual net profits from the mines so far as they reached to the occupier and the owner as the case may be. The annual net profits from a mine is obviously the difference between the cost of raising the coal and the price realised by its sale. The amount of royalty which is payable by the occupier to the owner is thus nothing more than a distribution of the profits. To take an illustration, let us suppose the annual net profits of a mine are Rs. 50,000 and the occupier has to pay Rs. 10,000 as royalty to the owner. If the provisions of the Cess Act are strictly complied with, the assessment on the mines in this year—assuming Rs. 50,000 to be the annual net profits as calculated from the average of the last three years—should be on the annual net profits of Rs. 50,000. But nobody suffers, neither the Collector, nor the owner, nor the assesse, if the assessment is made on Rs. 40,000 so far as the occupier is concerned and on Rs. 10,000 so far as the owner is concerned. It is true that the Act does not strictly enjoin an assessment in this form, but it is a mere irregularity adopted for the sake of convenience of everybody resulting in no loss to or excess assessment on any. This was forcibly pointed out in the elaborate judgment of Mookerjee J. in 34 Cal. 257.¹ It was observed at page 276 that :

"It must be conceded that the procedure followed by the Collector has been erroneous and in contravention of the provisions of the Cess Act. The Collector ought to have realised the cesses upon the annual net profits of the mine inclusive of the royalty, from the lessees of the plaintiff; and the lessees would then have been entitled to claim contribution as against the plaintiff on the basis of the principle enunciated in S. 80. Instead of this, the Collector has realised from the plaintiff direct, cesses, proportionate in amount to the royalties received by him, and the Collector has

further realised from the lessees of the plaintiff, cesses proportionate to the balance of net profits left in their hands after payment of the royalties to the plaintiff. There must, therefore, be an adjustment of accounts between the plaintiff and his lessees under S. 81, unless it so happens that the royalty is precisely half of the annual net profits. The result, consequently, has been that the Collector has received just what he was entitled to levy under the Act, but instead of levying the whole from the lessees in the first instance, he has levied the amount partly from the plaintiff and partly from his lessees. It is not suggested that the plaintiff has been prejudiced in any manner by this irregular mode of recovery on the part of the Collector."

This view was upheld by their Lordships of the Judicial Committee in 38 I. A. 31.² Mr. Ameer Ali, who delivered the judgment of their Lordships observed at page 35 :

"The inference is clear that the return required under the section is not with regard to the mine owner's profits but has reference to the general net profits of the property. The obligation to make the return is laid on the person most cognizant of the circumstances under which the mine is worked and of the profits derived from it. But that does not alter, in their Lordships' view, the character of the royalty received by the proprietor for his share of the profits of the mine. This conclusion is enforced by an examination of the provisions of Ss. 76, 80 and 81. This again clearly shows that although the cess is assessed on the basis of the net annual profits, it is paid in respect of the property and not in respect of any part of the profits."

Then towards the conclusion of the judgment at page 36 :

"It has been found by the Courts in India that the plaintiff has not been prejudiced by any irregularity on the part of the Collector in the mode of assessment. Their Lordships do not feel called upon to express any opinion on the question of the procedure he should have adopted."

This procedure which, as I have stated above, is the most convenient for all concerned, has been followed consistently by Collectors and has been upheld when the question came to be discussed in later cases. For the years 1930-31 right up to 1935-36 the assessment demands were made in accordance with this procedure, and, in my opinion, it must be held that the respondents cannot make any grievance upon this mode of assessment.

The Cess Act was amended in 1936 with effect from January 1937. By S. 5A the local Government is authorised by a notification to declare that any coal mine or coal quarry shall be a notified mine for the purposes of the Act—the coal mine in the present case is a notified mine and is not situated in Manbhum. By S. 6A the local cess shall be assessed on the annual despatches of coal and on the annual net profits of notified mines in accordance with the provisions of S. 6B. Section 6B provides for the determination of the rate of cess on notified mines, and in the proviso it is

declared that the rates at which the local cess should be levied on the annual despatches of coal and on the annual despatches of notified mines in the district of Hazaribagh shall be such rates as are calculated to produce in each year as nearly as possible on Rs. 1,75,000; the mine in this case is situated in the district of Hazaribagh. By S. 72, sub-clause (1), the Collector of the district is directed to cause a notice to be served upon the owner, chief agent, manager or occupier of a notified mine in the form in Schedule EE. The form of the notice in Schedule EE is exactly the same as was the form of the notice under old S. 72. In the present case, for the years 1936-37 and 1937-38 the assessment has been made in the same manner as was the practice adopted by the Collector and submitted to by the assessee when the Act was not amended. It must, therefore, be conceded that there is an irregularity, in these assessments also. But I am unable to hold that the amendment of the Cess Act has made any difference whatsoever to the application of the principles enunciated in *Manidra Chandra Nandi's case*.²

Mr. S. N. Basu vehemently argued that the assessment under the amended Act can only be made on the mines and not on the royalty which was paid by the lessees to the plaintiff. I do not agree with this contention. Of course, it would have been open to the defendants to show that in this case the assessment on the lessees was made on the entire annual profits including the sums which they had to pay as royalties to the plaintiff, but no evidence has been produced in support of that aspect of the case. On the other hand, the plaintiff has shown that he was assessed in respect of the royalties which he received. The proviso to S. 6B which fixes the figure at Rs. 1,75,000 is only intended to enable the Collector to fix the rate of cess. No evidence has been adduced in this case that the imposition of the cess upon the plaintiff for these years was illegal inasmuch as cess had already been realised amounting to Rs. 1,75,000, if the assessable figure of the royalties received by the plaintiff are excluded from consideration. For these reasons, I am unable to agree with the contention advanced by Mr. Basu that any change has been made by the amendment of the Cess Act so as to disentitle the plaintiff to be re-imbursed for the cess which has been imposed upon him for these two years. This disposes of the cross appeal of the respondents which must be dismissed with costs.

The learned Subordinate Judge has held

that the payment made by the plaintiff for these two years was voluntary, and therefore, he has disallowed the claim for these two years. The reason given by the learned Subordinate Judge is that in respect of 1936-37 and 1937-38 no assessment was made upon the plaintiff under S. 72, sub-section (2), Cess Act, and the assessment which was actually made was illegal and *ultra vires* as all coal mines in this district are notified and no cess could be assessed under S. 72, sub-s. (1) of the Act on royalties received in respect of them. In my opinion, this view of the learned Subordinate Judge is erroneous in law. The imposition of cess on the plaintiff for these two years is probably irregular, but I cannot hold that it was illegal and *ultra vires*. The evidence of P. W. 3 Jagdish Prasad, which has been relied upon by the learned Subordinate Judge is, in my opinion, wholly irrelevant in this case and inadmissible. The provisions of the Cess Act have to be examined and not any oral evidence of such a witness. The witness is a record-keeper on the revenue side in the Collectorate of the Hazaribagh estates. It is true that the notice issued to the plaintiff which has been filed (Ex. 19) is a notice in the form of Sch. E, whereas the notice should have been issued in the form in Sch. EE; but that does not make any substantial difference. I do not see how, after the service of notice by the Collector, the plaintiff could refuse to submit a return in respect of the coal mines in question. I disagree with this view of the learned Subordinate Judge. The claim of the plaintiff, therefore, with regard to the cess which he paid for 1936-37 and 1937-38, namely Rs. 1184 for the former year and Rs. 714 for the latter year, must be allowed. It remains to deal with the claim for the three years 1930-31, 1931-32 and 1932-33. The learned Subordinate Judge has embarked upon an elaborate investigation of the amount of royalties received by the plaintiff in a number of years beginning from 1929-30 right up to 1937-38 in order to find out what was the average of the three years for each of the three years in question. He says that the figures of income for 1929-30 and 1930-31 shown in the account produced by the assessee in the Court have not been exhibited in the suit, and therefore, it is impossible to say how far they are correct. He holds, therefore, that :

"It is not possible to say what was the correct figure upon which cess could be levied in respect of the accounting years 1930-31 and 1931-32." (see page 46, line 5.)

In my opinion, the learned Judge was wrong in embarking upon this inquiry because he should have been content with finding out whether the plaintiff was actually assessed for these three years and not the amounts for which he should have been assessed for these three years. In other words, the learned Subordinate Judge had no right to re-write another assessment for the royalties received by the plaintiff. That assessment can only be made by the Collector. It is true that the assessment should have been made upon the average net profits for the three years in each of these three years, but the Collector had jurisdiction to accept the actual amount of royalties returned by the plaintiff as having been received by him from the lessees as the basis of the assessment for each of the three years. It will also be noticed that in the various returns which have been accepted for these years and assessments made by the Collector, the assessment has been made on a large number of items and the royalties received by the plaintiff from a large number of coal mines, including the coal mines in question, have been shown in a lump sum. But it is not the case of the defendants that the plaintiff has included in the return or has been assessed as the result of the return upon an amount of royalty which was in excess of the royalty which he had received from these defendants. It is a satisfaction to me to hold that the view which I take is identical with the decision arrived at in a recent judgment of this Court, First Appeal No. 128 of 1942,⁶ where Chatterji J. delivered the judgment of the Division Bench on 11th January 1945. That view of the law is binding upon us, but having examined the matter at great length I have come to the same conclusion. Mr. Jha who appeared for the plaintiff submitted that although in the view of the law as it now stands he is not entitled to claim income-tax and interest on the cess, as was claimed by the plaintiff he does not wish to give up this point. It is sufficient to state that in view of the decisions of their Lordships of the Judicial Committee we are bound to hold that the claim of the plaintiff with regard to income-tax and to the interest on the cess has been rightly disallowed by the learned Subordinate Judge.

The defendants further contend that the plaintiff is not entitled to being re-imbursed for the amounts of cess which were imposed during the period the estate was under the Court of Wards upon the ground that the

Court of Wards, upon a mistaken view of the law did not choose to realise these sums from the defendants. The learned Subordinate Judge has taken the view that in giving a discharge without realising all the dues the Manager of the Court of Wards acted in excess of the authority which was vested in him and that the giving of such discharge without realising all the dues cannot be said to be for the benefit of the minor plaintiff, or for the advantage of his estate, and therefore, the Court of Wards had no authority to release the defendants from the liability to pay cess even assuming there was any release in fact. Mr. S. N. Basu contends that this view of the learned Subordinate Judge is erroneous. The provisions of the Court of Wards Act which are apposite to this case are contained in S. 18 of the Act which provides that the Court (that is to say the Court of Wards) may sanction the giving of leases or farms of the whole or part of any property in its charge and may direct the mortgage or sale of any part of such property, and "may direct the doing all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward." I am enclosing the words relied upon in inverted commas. The question for decision is, whether the Court of Wards, in refusing to make a demand for the cess which I have held to be payable by the defendants to the plaintiffs, has done an act or direct the doing of an act after judging it to be most for the benefit of the property and the advantage of the ward. There can only be one answer to this question. It was not for the advantage of the ward or the benefit of his property that no demand was made from the lessees for the cess now found to be due from them. Nor is there any trace throughout the whole proceedings of any thought having been taken as to whether this refraining from demanding was beneficial to the ward or his estate. As I have said earlier in the course of the judgment, the Court of Wards merely omitted to make a demand. It never decided the question *bona fide*. The observations of Sir Ford North when delivering the judgment of their Lordships in 28 I. A. 190⁷ quoted by the learned Subordinate Judge are quite apposite.

Mr. Basu relied upon the case in 8 Pat. 86.⁸ In that case it was held that it was within the power of the Court of Wards to

6. Reported in ('46) 33 AIR 1946 Pat. 154 *infra*, Kamakshya Narain Singh v. Bhuramull.

7. ('01) 23 All 394 : 28 I. A. 190 (P. C.), Raja Mohammad Mumtaz Ali v. Sakhawati Ali.

8. ('29) 16 A. I. R. 1929 Pat 369 : 8 Pat 86 : 119 I. C. 903, Badrinath v. Naresh Mohan.

adjust mutual accounts between a ward's estate and certain other estates and admit liability on the part of the ward's estate. The position, however, is different here. Nothing was due from the ward's estate to the lessees, and there was no mutual account to be adjusted. Here the liability was unilateral, always by the lessees to the plaintiff. This case is of no assistance to Mr. Basu.

Reliance was also placed upon (1826) 130 E. R. 671 : 4 Bing. 11.⁹ In that case a landlord's receiver had allowed a tenant to make a deduction in respect of a payment for land-tax every year for seventeen years, greater than the amount which the landlord was liable to pay, and the landlord knew, or had the means of knowing, all the facts. In these circumstances it was held that the landlord could not distrain for the amount erroneously allowed, although the receipt given every year shewed the amount paid and the amount deducted. It was argued on the strength of this case that it should be held that the Court of Wards by giving the receipts to the defendants every year in a way made a partial reduction of the amount due from the lessees for those periods. If the decision of Best C. J. is read it will be seen that he repelled the argument that payment of part of the rent in that case should not be read as discharge of the whole, to which it was said the landlord had never renounced his claim by holding :

"But this transaction amounts to a payment of the whole But it is an established principle, that if money be given or paid (and a settlement in account is the same thing)—see (1825) 4 B & C 281¹⁰—with a full knowledge of all circumstances at the time of the payment, it cannot be recovered by the payer: (1813) 5 Taunt. 143.¹¹ For seventeen years this rent was settled in account and considered as paid, so that an action for the amount would have been answered by a plea of payment."

He then gave an illustration that if the landlord made an allowance under a mistaken idea, without the means of knowing the real state of facts, it might have been esteemed an allowance by mistake and made in ignorance, and might perhaps have been recovered. But, says the learned Chief Justice :

"The landlord must have known these facts, or have had the means of knowing that it was a charge on the improved rent. If he knew, or had the means of knowing all the facts, a mistake as to legal rights would not entitle him to make this claim."

9. (1826) 4 Bing 11 : 130 E. R. 671, *Bramston v. Robins*.

10. (1825) 4 B & C 281, *Skyring v. Greenwood*.

11. (1813) 5 Taunt 143, *Brisbane v. Dacres*.

Park J. made two remarks which may be quoted here :

"This was as much a payment as if the tenants had paid down the whole rent and the landlord had returned the amount of the land tax. The receiver was his agent, and the landlord was bound by the receiver's acts."

It will be noticed that in the present case the ward is not bound by the acts of the Court of Wards unless the provisions of S. 18 of the Act can be said to have been fully complied with. Burrough J. observed that this was not a case of a single payment, but of a series of payments for sixteen or seventeen years, and that what the landlord had allowed in those settlements could not be claimed by him again. In his view the demand was most unconscientious. As I have said above, there is no equity in favour of the defendants, and, in my opinion, the demand was perfectly just. For these reasons this case, (1826) 130 E. R. 671,⁹ cannot be of any assistance to Mr. Basu. In my view the learned Subordinate Judge took the correct view.

Attention was also drawn in this connection to a number of documents, for instance Ex. A(1) a letter from the Manager of the Court of Wards to the defendants, dated 30th January 1937. The letter states that the estate dues amounting to Rupees 4468-1-10 being royalty on account of the coal up to 30th June 1936, has become over due. Exhibit 9 is a letter from the Manager of the Court of Wards dated 21st March 1932. In that it is stated that Rs. 2000 on account of royalty from coal has been received and demand is made for remitting of the balance. Exhibit D is a notice that a certificate for dues on account of royalty has been filed under the Public Demands Recovery Act for a sum of Rupees 7333-2-9. The details are given at page 55 showing that the royalty is being demanded for two years together with interests and costs. It is contended on the strength of these and similar documents that the Court of Wards took the view that nothing was due from the defendants except the royalty. These documents, in my opinion, merely show that the Court of Wards demanded the arrears of royalty from the defendants, but did not demand any cess from the defendants. The documents do not show why no demand was made. It may be that through an oversight the demand for cess was omitted to be made. But these documents do not bear out the contention that the Court of Wards decided that no cess was due from the defendants. It should be remembered

that the cess was not payable along with the royalty received, but cess was only payable after an assessment on that royalty had been made and after the tax so assessed had been paid by the Court of Wards. If there had been a *bona fide* decision on a dispute between the lessor and the lessee with regard to the liability to pay cess, the matter may have been different. The utmost that can be said here is that the Court of Wards, for some reasons or another, which it is impossible to trace did not make any demand, not because they thought that they were doing anything in the interest of the minor, or for the benefit of the estate, but because in truth they never gave the slightest consideration to the question whether cess was or was not payable by the defendants. The documents, therefore, relied upon do not help the defendants.

It was then argued that the plaintiff, after he came of age and took possession of the estate when it was released from the Court of Wards, himself took the same view of his legal rights, and attention was drawn to a number of letters. Exhibit A(3) is a letter from the Diwan dated 5th September 1938, in which an account had been sent of the dues by way of royalty on despatch of coal. No mention is made therein of the cess. Stress was laid upon the words at page 60 that notice was being given to the lessees under the stipulation contained in clause 1 of the general provisions of the lease and they were called upon "to clear off the dues within a fortnight." It is argued that the word "dues" is comprehensive enough to include not only royalty but also cess, and, therefore when this notice was sent to demand the amounts stated to be due by way of royalty only, the plaintiff must be taken to have abandoned his rights to the cess as a matter of law. The letters Exhibits A (10) dated February 1939, and A (4) dated May 1939, and A (5) dated 17th April 1940, are to the same effect. Exhibit B series are receipts granted by the Diwan to the North Damodar Colliery on account of royalty and interest thereon. These documents, in my opinion, merely establish that the plaintiff claimed and on receipt of certain sums gave receipts for full satisfaction of the royalties due to him on the despatch of coals, but they do not indicate that the plaintiff abandoned his claim to the amount for which he is liable to be re-imbursed under the law on account of cess paid by him. There are no equities in favour of the defendants. How can they resist the claim of the plaintiff merely because

they have not paid the amount due from them upon the ground that no claim has been made? The suit is not barred by limitation, and therefore, in my opinion, this contention also has been rightly overruled.

The result is that the appeal is allowed in part. The decision of the learned Subordinate Judge with regard to the claim for the years 1930-31, 1931-32, 1932-33, 1936-37 and 1937-38 must be allowed so far as the amount of cess is concerned. The amount of cess due to the plaintiff will be taken as given in column 3 for each of these years at page 5. The cross-appeal is dismissed with costs.

As the appellant has failed with regard to the major part of the claim which he made in this appeal, the proper order for costs will be that the appellant will receive from and pay costs to defendants 2 and 3 as between himself and defendants 2 and 3 in proportion to their success or failure in this Court. The order for costs passed by the lower Court is not being disturbed.

Das J. — I agree.

V.B.

Appeal partly allowed.

[Case No. 64.]

A. I. R. (33) 1946 Patna 150

FAZL ALI C. J. AND RAY J.

Chander Singh and others—Appellants
v.

Kamalpore Co-operative Society —
Respondents.

Appeal Nos. 214 and 245 of 1944, Decided on 24th August 1945, from order of Sub-Judge, Gaya, D/- 15th May 1944.

(a) Bihar and Orissa Co-operative Societies Act (6 [VI] of 1935), Ss. 32, 63, 48 and 54 — Applicability of Ss. 32 and 63 — Award in favour of society in respect of debt due from member — S. 32 does not apply — S. 63 applies and limitation is governed by Limitation Act.

The words "debts of a registered society" in S. 32 clearly mean debts owed by the society and not the debts owed to the society. Thus, S. 32 refers only to cases where the society is a debtor and not to cases where it is a creditor. It refers to the cases of the type referred to in S. 54. In such cases the liability of the estate of the deceased member continues only for a period of two years from date of his decease. [P 152 C 1]

On the other hand S. 63 applies to cases of debt due to a society by a member. Section 63 clearly means that the period of limitation prescribed in the Limitation Act for suits in regard to debts will be the period which will apply to claims made by the society to enforce its debts but the period will be computed from the date when the member of the society who is liable for the debts in question, dies or ceases to be a member. [P 152 C 2]

A mortgage award was passed in favour of the society in 1942 in respect of a mortgage-debt due to the society from a member who died in 1937 :

Held that S. 63 applied. The liability of the member had not been extinguished under the Limitation Act and the award was not without jurisdiction. [P 152 C 2]

(b) Bihar and Orissa Co-operative Societies Act (6 [VI] of 1935), Ss. 32 and 63 — Previous award against member of society in respect of different debt and different kind of liability — Decision in award held could not operate as *res judicata* — Civil P. C. (1908), S. 11.

B was a member of a co-operative society. In respect of a debt due from the society to the Central Co-operative Bank an award was passed in favour of the bank for recovering the debt from *B* as member of the society. But it was held by the revenue Court that under S. 32 the claim of the bank was barred by limitation and the estate of *B* was not liable for the debts due by the society as the award was passed more than two years after the death of *B* in 1937. Subsequently the society obtained a mortgage award in 1942 in respect of a mortgage executed by *B* in its favour:

Held that as the previous award was with reference to a totally different debt and the liability of *B* was a different kind of liability the decision in the previous award could not operate as *res judicata* in the proceedings in respect of the subsequent award. [P 152 C 2]

C. P. C.—

(44) Chitale, S. 11, N. 28, Pt. 26.

(41) Mulla, Page 71, Note "Liability . . . title."

Baldeva Sahay, Girishnandan Sahay Sinha and Jamuna Prasad Chaudhury —
for Appellants.

K. Dayal — for Respondents.

Fazl Ali C. J. — These are two miscellaneous second appeals arising out of an execution proceeding and the points involved in them will be clear from the following brief statements of facts. One Sito Singh, who is the father of appellant 1 and uncle of the other appellants, was a member of the Kamalpura Co-operative Society. This society owed money to the Central Co-operative Bank of Nawadah and, on the basis of this debt, the Assistant Registrar of the Co-operative Societies passed an award in favour of the Bank for recovering the amount due to the Bank from the members of the Society, the extent of the liability of each member for this debt being specified in a schedule attached to the award. The award was put in execution in the certificate Court, but the certificate officer found that inasmuch as Sito Singh had died two years before the requisition for certificate was made, the claim of the Bank against that individual member of the Society was barred under S. 32, Bihar and Orissa Co-operative Societies Act. This decision was ultimately upheld by the Revenue Court. It appears that Sito Singh had executed two mortgage bonds in favour of the Kamalpura Co-operative Society on 22nd August 1928 and on 24th June 1927 res-

pectively. In connection with these bonds the Assistant Registrar passed mortgage awards in 1942 for the recovery of Rs. 554-4-0 and Rs. 439-9-0 respectively besides future interest against the appellants. The awards were put in execution in the Munsif's Court at Gaya and two execution cases were started against the appellants. In these two cases the appellants contended that both the mortgage awards were ultra vires and without jurisdiction and the liability of the estate of Sito Singh, the deceased member of the Society, had ceased two years after his death which occurred on 17-1-37. It was contended that inasmuch as the awards were passed nearly five years after the death of Sito Singh, the claim of the society was barred by limitation and there was no dispute within the meaning of S. 48, Co-operative Societies Act, to enable the Registrar to pronounce an award. Other objections were also raised by the appellants but it is unnecessary to refer to them because they have not been pressed in this Court. The Munsif overruled the objections and his decision was upheld on appeal by the Subordinate Judge. Hence these miscellaneous second appeals. The first point to be determined is whether the Assistant Registrar had any jurisdiction to pass the mortgage awards which are under execution. The learned advocate for the appellants relies on S. 32, Co-operative Societies Act, to support the view that the Registrar's award is without jurisdiction. This section runs as follows:

"The liability of a past member or of the estate of a deceased member for the debts of a registered society as they existed on the date of his ceasing to be member or of his decease, as the case may be, shall continue for a period of two years from such date."

It is contended that the Registrar had no jurisdiction to deal with the two mortgages since in view of this provision Sito Singh's estate had ceased to be liable two years after his death. In this connection a reference to S. 48 of the Act seems to be necessary. This section provides that if a dispute arises among the classes of persons mentioned in the section, such dispute shall be referred to the Registrar. The explanation to the section makes it quite clear that a claim by a registered society for any debt or demand due to it from a member, past member, etc., is a dispute touching the business of the society. The proviso to the section, however, states that no claim against a past member or the estate of a deceased member shall be treated as a dispute if the liability of the past member or of the estate

of the deceased has been extinguished by virtue of S. 32 or S. 63. It is contended that in the present case the liability of Sito Singh and his estate was extinguished by S. 32 and, therefore, there was no dispute to be referred to the Registrar under S. 48 and consequently the awards were without jurisdiction. This argument is based upon a misapprehension as to the exact meaning of S. 32. The crucial words in the section are "debts of a registered society", which clearly mean the debts owed by the society and not the debts owed to the society. Thus, S. 32 refers only to those cases where the society is a debtor and not to those where it is a creditor. Under S. 54 all sums due from a registered society to Government and all sums recoverable from a registered society under certain sections of the Act may be recovered firstly from the property of the society; secondly, in the case of a society, the liability of the members of which is limited, from the members, past members or estates, of deceased members or their sureties subject to the limit of their liability; and, thirdly in the case of other societies from the members, past members, or estate of deceased members or their sureties to such extent or in such proportion as may be determined by the Registrar. This section makes it clear that the sums due from the society may be recovered in certain cases not only from the property of the society, but also from the estate of deceased members. Section 32 in my opinion refers to the cases of this type and provides that in such cases the liability of the estate of the deceased member shall continue only for a period of two years from such date. This section was therefore directly relevant to the previous dispute which arose between the Co-operative Bank of Nawadah and the Kamalpura Co-operative Society and it was accordingly held that the estate of Sito Singh could not be held liable as the liability was sought to be enforced more than two years after his death. The present case, however, is not a case in which the liability of the estate of deceased person is to be determined in connection with the "debts of the society." This is a case in which its liability is to be determined in connection with certain debts which the deceased member owed to the society. Such a case will be governed by S. 63 of the Act which provides that :

"Notwithstanding any of the provisions of the Indian Limitation Act, the period of limitation for debt including interest due to a registered

society by a member thereof shall be computed from the date on which such member dies or ceases to be a member of the society."

The language of this section clearly brings out the distinction between the expressions "debts of a society" and "debts due to a society," the section being clearly applicable to cases belonging to the latter category. In such a case, according to the section, the period of limitation is to be computed from the date on which the member dies. It was contended before us that the Co-operative Societies Act is a self-contained Act and the Limitation Act has no application to cases arising under it. In my judgment the section clearly means that the period of limitation prescribed in the Limitation Act for suits in regard to debts will be the period which will apply to claims made by the society to enforce its debts, but the period will be computed from the date of the death of the members of the society who are liable for the debts in question. If this interpretation is correct, it cannot be said that the mortgage-debts which are the subject of the mortgage awards were barred by limitation at the date when the award was pronounced. The award was, therefore, a good award and cannot be challenged in an execution proceeding. It was also contended by the learned advocate for the appellant that the decision in the previous case by which it was held that the estate of Sito Singh was not liable for the debts due to the Co-operative Bank of Nawadah from the Kamalpura Co-operative Society operated as *res judicata* and in this view the Registrar had no jurisdiction to pass an award. This argument also does not appear to me to be sound. The previous award was with reference to a totally different debt and the liability of Sito was a different kind of liability. In the previous dispute he was sought to be made liable as a member of the society. In the present dispute he has been made liable as a mortgagor and as a debtor of the society. In these circumstances there can be no question of *res judicata*. In my opinion the order of the Court below is correct and I would accordingly dismiss these appeals with costs.

Ray J. — I agree.

G.N./D.H.

Appeals dismissed.

S. N. Das

Advocate High Court

Jammu & Kashmir

Srinagar.

[Case No. 65.]

A. I. R. (33) 1946 Patna 153

FAZL ALI C. J. AND RAY J.

*Sunder Koeri and another —**Plaintiffs—Appellants*
v.*Commissioner of Sasaram Municipality — Defendant—Respondent.*

Appeal No. 122 of 1944, Decided on 23rd August 1945, from appellate decree of Add. Sub-Judge, Arrah, D/- 20th December 1943.

(a) Bihar and Orissa Municipal Act (7 [VII] of 1922), S. 82 (1) (a)—Joint Mitakashara family — Individual members if can be separately assessed under S. 82 (1) (a).

A joint Mitakashara family is one entity and if the entire income of the family is derived from joint property and there are no separate earnings of the individual members then the individual members cannot be separately assessed to personal tax under S. 82 (1) (a). If the members of the joint family have separate earnings they can be separately assessed to personal tax under S. 82 (1) (a).

[P 153 C 2]

(b) Bihar and Orissa Municipal Act (7 [VII] of 1922), S. 82 (1) (a)—Joint Mitakashara family — Finding that members have separate earnings is one of fact and binding in second appeal — Civil P. C. (1908), S. 100.

A finding that the individual members of a joint Mitakashara family have separate earnings is one of fact and is binding in second appeal in the absence of any ground taken in the grounds of appeal that the finding is based upon no evidence at all.

[P 154 C 1]

C. P. C.—

('44) Chitaley, S. 100, N. 28 Pt. 3, N. 52.

D. N. Varma — for Appellants.

Sarjoo Prasad and Rajani Kant Sinha —

for Respondent.

Fazl Ali C. J. — This appeal arises out of a suit instituted by the plaintiff-appellants for a declaration that the assessment of a personal tax under S. 82 (1), cl. (a), Bihar and Orissa Municipal Act, upon them by the Municipal Commissioners of Sasaram was illegal and ultra vires. The suit was decreed by the trial Court but has been dismissed by the lower appellate Court and hence this second appeal. Plaintiffs 1 and 2 are full brothers and they have been found to be members of a joint Mitakashara family. The case of the Municipality was that the plaintiffs were separate and resided in two separate holdings and had separate income. They also resisted the suit on the ground that the civil Court had no jurisdiction to disturb the assessment. On a reference to the municipal record of the case it appears that there are two separate holdings, one bearing No. 112 and another bearing No. 117. One of the plaintiffs has been assessed by the Municipality with a personal

tax of Rs. 9 by reason of his occupation of one of the holdings and the other has been assessed at Rs. 6. per cent. by reason of his occupation of another holding. The Munsif held that because the plaintiffs belonged to a joint Hindu family, there cannot be any separate assessment under S. 82 (1), cl. (a). The learned Subordinate Judge has arrived at two alternative conclusions. In the first place, he has held that "the two plaintiffs though joint have undoubtedly separate earnings." The second conclusion is expressed in these terms :

"Assuming however that the plaintiffs are joint in business and property and they have no separate earnings of their own, still they would be liable to separate assessment of personal tax under the clear provision of law enacted in S. 82 (1), cl. (a) of the Bihar and Orissa Municipal Act."

It must be stated at once that the second conclusion of the learned Subordinate Judge is wrong in law. Section 82 provides among other things that the Commissioners may impose within the limits of the Municipality a tax upon persons in sole or joint occupation of holdings within the Municipality according to their circumstances and property within the Municipality. The view expressed by the learned Subordinate Judge is that the joint family is not a person and, therefore, individual members of such a family may be separately assessed; but it seems to me to be quite clear that if they have no separate income and no separate earnings, they cannot be so assessed. The joint family is one entity and if the entire income of the family is derived from joint property and there are no separate earnings of the individual members then the individual members cannot be assessed under S. 82 (1), cl. (a). The question, however, remains as to the effect of the finding of the learned Subordinate Judge (the lower appellate Court) that the plaintiffs, though joint, have separate earnings. In my opinion, the words of the section are broad enough to permit assessment of members of a joint family having separate earnings. But the question which was raised by Mr. Varma, the learned advocate for the appellant, was that in the present case there was no evidence before the learned Subordinate Judge to enable him to come to the conclusion that the plaintiffs had separate earnings. In arriving at his finding, the learned Subordinate Judge simply says that he is driven to that conclusion as

"otherwise they (the plaintiffs) cannot be imagined to maintain themselves and their family members on an insignificant income from 12 bighas of land only."

It is pointed out that the khatians which have been filed in this case show that they have a little more than 12 bighas and it is further contended that the inference drawn by the learned Judge from the circumstances to which he refers is unwarranted. If there had been no evidence at all in this case, I would have been inclined to accept this contention, but there is no special ground taken in the grounds of appeal that the finding is based upon no evidence and on looking into the record of the case I find that at least one of the witnesses examined on behalf of the Municipality has stated that the two plaintiffs have separate earnings. In these circumstances, I am compelled to hold that the finding arrived at by the learned Subordinate Judge is a finding of fact and is binding on this Court and though the learned Subordinate Judge has taken a wrong view on the first question, this appeal fails on the ground that the two plaintiffs have been found to have separate earnings. I would accordingly dismiss this appeal, but there will be no order for costs.

Ray J.—I agree.

G.N./D.H.

Appeal dismissed.

[Case No. 66.]

A. I. R. (33) 1946 Patna 154

CHATTERJI AND SHEARER JJ.

Raja Kamakshya Narain Singh—

Plaintiff—Appellant

v.

Bhuramull and others—Defendants

—Respondents.

Appeal No. 128 of 1942, Decided on 11th January 1945, from original decree of Addl. Sub-Judge, Hazaribagh, D/- 9th June 1942.

(a) Civil P. C. (1908), S. 34—Interest before suit when can be allowed—Lessor paying cess which lessees were bound to pay under lease—No provision in lease for payment of interest on cess—Suit to recover amount paid by lessor—Case is one of wrongful detention of money—No interest prior to suit can be allowed.

In the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest for the period before the institution of the suit interest for that period cannot be allowed by way of damages for wrongful detention of the plaintiff's money: ('38) 25 AIR 1938 P. C. 67, *Foll.* [P 155 C 2]

The lessor had to pay cess which was assessed on the leasehold properties and which the lessees were under the terms of the lease bound to pay. In the suit by the lessor against the lessee to recover the amount of cess the lessor claimed interest prior to suit:

Held that (1) as there was no provision in the lease for payment of interest no interest prior to

institution of the suit could be claimed on the basis of contract; nor could interest on cess be allowed on equitable grounds under the proviso to S. 1, Interest Act, as the case was one of wrongful detention of money. The plaintiff, therefore, was not entitled to interest on cess prior to the institution of the suit: *Case law discussed.* [P 155 C 2; P 156 C 2]

(2) as regards interest from the date of the suit, the position was different. The matter was governed by S. 34, Civil P. C., which gave complete discretion to the Court to award *pendente lite* interest. Having regard to the fact that the claim for cess which was being allowed extended over a long period from 1918-19 to 1938-39, the Court ought to allow *pendente lite* interest. [P 155 C 2; P 156 C 2]

C. P. C.—

('44) Chitaley, S. 34, N. 6; N. 3 Pt. 1.

('41) Mulla, Page 143 "N. Interest...Suit"; Page 144 Pt. (h).

(b) Limitation Act (1908), S. 6—Plaintiff disqualified proprietor—His estate under Court of Wards—Plaintiff cannot claim benefit of Section 6.

The fact that the plaintiff was a disqualified proprietor whose estate was under the management of the Court of Wards will not save limitation under S. 6: ('18) 5 A. I. R. 1918 P. C. 180, *Rel. on.* [P 157 C 1]

Limitation Act—

('42) Chitaley, S. 6, N. 23 Pt. 3.

('38) Rustomji, Page 123 Pt. 2.

(c) Bengal Cess Act (9 [IX] of 1880) as amended by Bihar Act (2 of 1936), S. 72—Under lease lessee to pay cess that might be assessed—Lessor paying cess and seeking to recover same from lessee—That cess was not imposed in accordance with law is no defence to lessor's claim.

Under the terms of the lease the lessee was to pay cess that might be assessed by Government. The cess assessed by the Government was paid by the lessor who filed a suit to recover the same from the lessee:

Held that the plea that the lessee was not liable under the lease to pay cess to the plaintiff unless the assessment was in accordance with the provisions of law was not open to the lessee as under the lease the lessee was required to pay cess that might be assessed. As cess was assessed by Government and the same was paid by the lessor, the lessor was entitled to recover the same from the lessee. [P 157 C 2]

L. K. Jha and Shambhu Prasad Singh—
for Appellant.

Dr. D. N. Mitter and S. C. Muzumdar—
for Respondents.

Chatterji J.—This is an appeal by the plaintiff in a suit for recovery of royalty, cess and income-tax said to be payable by the defendants in respect of 246 bighas 7 ch. of coal lands under two leases dated 3rd October 1912 and 27th February 1922 held by the defendants under the plaintiff. The claim in respect of royalty was Rs. 3673-6-1 besides interest, for the period from September 1937 to July 1940. The claim in respect of cess was Rs. 4064, besides interest, for the period from 1917-18 to 1938-39. The claim in

respect of income-tax was Rs. 25,717-4-0, besides interest, for the period from 1917-18 to 1938-39.

The first lease dated 3rd October 1912 was executed by the plaintiff's grandfather in respect of 200 bighas. The second lease dated 27th February 1922 was executed in respect of 46 bighas 7 ch. during the minority of the plaintiff by the Court of Wards which was in charge of his estate till 10th August 1937 when he attained majority. The plaintiff's case is that the defendants did not pay the royalties reserved in the leases from September 1937 to July 1940, and that they did not pay cess and income-tax, according to the stipulation in the leases from 1917-18 to 1938-39. To save limitation, the plaintiff alleged that his estate was under the Court of Wards since his father's time till 10th August 1937 when the plaintiff attained majority, and, therefore, limitation should run from that date. The present suit was brought on 9th August 1940.

The defendants denied the claim of the plaintiff and pleaded limitation. They also pleaded that the suit was not maintainable as the claim was in respect of two separate leases.

The learned Subordinate Judge who tried the suit decreed the claim for cess, except for the period 1917-18, 1918-19 and 1936-37 to 1938-39. He also slightly modified the rate at which cess was claimed. The claim for 1917-18 and 1918-19, which related to the plaintiff's father's time, was dismissed on the ground of limitation. The claim for 1936-37 to 1938-39 was dismissed on the ground that the cesses in respect of these years were not assessed according to the provisions of the amended S. 72, Cess Act (2 [II] of 1936), and, therefore, the payments made by the plaintiff in respect of these years were voluntary. The claim for interest on cess was disallowed. The claim for royalty was substantially decreed. The claim for income-tax was altogether dismissed.

The plaintiff, therefore, preferred this appeal, limiting the claim to cess and royalty, while the defendants filed cross objection. At the hearing of the appeal, however, the plaintiff pressed his claim only with regard to cess and interest on cess. The first point argued by Mr. L. K. Jha on behalf of the appellant is that the learned Subordinate Judge was not justified in disallowing interest on cess, and at any rate he should have allowed interest from the date of the suit. Under the terms of the two leases, Exs. 1 and 1 (a), dated 3rd October

1912 and 27th February 1922 respectively, the lessees were required to pay

"cess, taxes and other impositions which now are or may at any time hereafter during the continuance of this lease be assessed or imposed on the said lands and premises."

There is no provision for payment of interest on cess in either of the leases. Therefore, no interest for the period before the institution of the suit can be claimed on basis of contract. In 65 I. A. 66¹ their Lordships of the Privy Council held that in the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest for the period before the institution of the suit, interest for that period cannot be allowed by way of damages for wrongful detention of the plaintiff's money. That was a suit brought by the plaintiff as a contractor against the Bengal Nagpur Railway for recovery of the price for the work done by him. But the principle laid down in that case is of general application. Referring to the Interest Act (32 [XXXII] of 1839), their Lordships said :

"Under the Interest Act, 32 [XXXII] of 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. . . . The Interest Act, however, contains a proviso that 'interest shall be payable in all cases in which it is now payable by law.' This proviso applies to cases in which the Court of Equity exercises jurisdiction to allow interest."

In other words, their Lordships pointed out that the Court might award interest under the above-quoted proviso to S. 1, Interest Act, where equitable jurisdiction could be invoked. Mr. Jha contends that in the present case interest should be allowed on equitable grounds. But I cannot find what equitable grounds there are. Under the terms of the leases the defendants were required to pay cesses which were to be assessed by the Government. The plaintiff was assessed with cess on the entire income derived from his estate. He had to pay the cess which was assessed on these leasehold properties, and it is this cess which he seeks to recover from the defendants under the terms of leases. The defendants could not know what amount the plaintiff actually paid and when he paid, unless the plaintiff informed the defendants. On these facts there is obviously no equity on the side of the plaintiff. If in this case interest were to be allowed on the ground of equity, then in

1. ('38) 25 AIR 1938 P. C. 67 ; I. L. R. (1938) 2 Cal. 72:32 S.L.R. 374:65 I. A. 66:173 I. C. 15 (P. C.), B. N. Ry. Co., Ltd v. Ruttanji Ramji.

every case of wrongful detention of money, interest could be allowed, which would be quite contrary to the principle laid down by the Privy Council in the above case. Mr. Jha relies on the earlier decisions of the Privy Council in 5 I. A. 31,² 22 I. A. 199³ and 43 I. A. 294.⁴ In the first case their Lordships, referring to the above quoted proviso to S. 1, Interest Act, held that interest could be allowed on mesne profits, having regard to "the state of the law and the practice in India independently of the statute." It will not be out of place to mention here that according to the definition of "mesne profits" in the present Civil Procedure Code, it includes interest. In the second case, their Lordships had to deal with a bond which provided for payment of the principal in two years with interest, but omitted to provide for interest after the expiration of the two years. The question arose whether the plaintiff was entitled to interest beyond two years. Their Lordships held that for the subsequent period the plaintiff was entitled to interest as damages for non-payment at the due date. In the third case; certain heirs of a deceased Muhammadan sued his widow, who was in possession of her husband's estate in lieu of her dower, for the taking of accounts and for recovery of possession of their shares in the estate in case the dower debt was found to be discharged. The widow in her defence claimed interest on her dower. Their Lordships held that she could not be made to account for the profits of the estate without being allowed reasonable compensation for forbearing to enforce her right to the dower debt; this compensation was to be calculated on the basis of an equitable rate of interest. Thus the facts of these cases are quite distinguishable. In any view, we cannot go behind the later decision in 65 I. A. 66¹ to which I have already referred.

It is suggested by Mr. Jha that their Lordships of the Privy Council kept the matter open in a still later case, 66 I. A. 12.⁶ But in this case their Lordships, referring to the earlier decision in 65 I. A. 66,¹ said :

2. ('78) 3 Cal. 654; 5 I. A. 31; 3 Sar. 782; 3 Suther 495 (P. C.), Hurroopersaud Roy Chowdhry v. Shampersaud Roy Chowdhry.

3. ('95) 17 All. 511; 22 I. A. 199; 6 Sar. 624 (P. C.), Chajmal Das v. Brijbhukan Lal.

4. ('16) 3 A.I.R. 1916 P. C. 46; 38 All. 581; 43 I. A. 294; 36 I. C. 87 (P. C.), Hamira Bibi v. Zubaida Bibi.

5. ('38) 25 A.I.R. 1938 P. C. 292; I. L. R. (1939) Kar P. C. 35; I. L. R. (1939) Lah. 56; 66 I. A. 12; 178 I. C. 425 (P. C.), Gokal Chand Jagan Nath Firm v. Nand Ram Das Atma Ram.

"Their Lordships will not repeat what was there said. In the present case no custom has been shown for treating the debt as a debt in equity to which equitable rules as to recovery of interest can apply."

Thus their Lordships affirmed the same principle. Mr. Jha also relies on the latest decision of this Court in 20 Pat. 162,⁶ which was decided by Harries C. J. and Dhavle J. That was a suit for compensation brought by one cosharer against another who was in exclusive possession of lands held in common. It was held that the plaintiff was entitled to interest on the compensation allowed. Dhavle J., who dealt with all the previous cases including 65 I. A. 66,¹ pointed out that there is hardly any distinction between mesne profits and compensation as between cosharers. His Lordship said :

"But the difference between mesne profits and compensation in the case of cosharers tends on occasion to be very fine indeed."

As I have already pointed out, the present definition of mesne profits in the Civil Procedure Code includes interest and even under the old law interest used to be allowed on mesne profits. For the aforesaid reasons I am of opinion that the plaintiff is not entitled to interest on cess prior to the institution of the suit. As regards interest from the date of the suit, however, the position is different. The matter is governed by S. 34, Civil P. C., which gives complete discretion to the Court to award *pendente lite* interest. The learned Subordinate Judge has not said anything regarding *pendente lite* interest. Having regard to the fact that the claim for cess which is being allowed extends over a long period from 1918-19 to 1938-39, I consider that the Court ought to allow *pendente lite* interest. It is argued by Dr. D. N. Mitter on behalf of the respondents that in the grounds of appeal no objection has been taken with regard to *pendente lite* interest, nor has court-fee been paid on such interest. As regards court-fee the appeal has been valued at Rs. 9153-6-4 the bulk of which includes interest. Ground No. 11 of the memorandum of appeal covers the entire interest.

The next point is whether the plaintiff is entitled to cess for the period 1917-18, 1918-19 and 1936-37 to 1938-39. So far as the cess for 1917-18 is concerned, it was paid during the lifetime of the plaintiff's father, who was then a minor. He attained majority on 6th April 1919, but he died on 10th April 1919. Limitation in respect of the cess for 1917-18 would, therefore, run from 6th April

6. ('41) 28 AIR 1941 Pat 90; 20 Pat. 162; 192 I. C. 456, Raj Ranjan Prasad v. Khobari Lal.

1919. It is true that the Court of Wards which had already been in possession of the estate during the plaintiff's father's minority continued in possession without any break until the plaintiff attained majority. But this fact is of no avail to the plaintiff. The point is settled by the decision of the Privy Council in 46 I. A. 60.⁷ The claim for 1917-18 is obviously barred. As regards the cess for 1918-19, the learned Subordinate Judge altogether overlooked the fact that the payment of this cess was made on 16th February 1920, after the death of the plaintiff's father, when the Court of Wards was in possession on behalf of the plaintiff. Limitation for the cess in respect of 1918-19 therefore, will run from the date when the plaintiff attained majority. The suit being brought within three years from that date, the claim for 1918-19 must be held to be within time. It is argued by Dr. D. N. Mitter that it has not been found by the learned Subordinate Judge that the payment in fact was made on 16th February 1920. In Sch. B to the plaint, a detailed account of the dates of payment of the cesses is given. The plaintiff also produced the chalans in support of his claim. There is nothing on behalf of the defendants to suggest that the payment in respect of 1918-19 was made on any other date. It must, therefore, be taken that the payment was actually made on 16th February 1920. The amount of cess for 1918-19, as found by the Subordinate Judge, is Rs. 23-11-0.

Then as regards the cesses for 1936-37 to 1938-39, the learned Subordinate Judge was palpably wrong in dismissing the plaintiff's claim. The reason given by him is that S. 72, Cess Act, was amended in 1936, but cess was levied on the plaintiff under old S. 72, and, therefore, "the assessment was illegal and the payment of the cess by the plaintiff was voluntary payment." Under the old S. 72 notice was to be served in the form in Sch. E on the owner or occupier of every mine requiring him to submit a return of the net annual profits of the property. Under the next sub-s. (2) of the section notice is to be given in the form in Sch. EE requiring the owner or occupier of every notified mine to submit a return showing

"(a) the annual despatches of coal and coke from such mine calculated on the average of the annual despatches of coal and coke therefrom for the last three years for which accounts have been made up, and (b) the annual net profits from such mine calculated on the average of the annual net profits

7. (18) 5 A. I. R. 1918 P. C. 180 ; 46 Cal. 694 : 46 I. A. 60 : 50 I. C. 202 (P. C.), *Mani Singh Mandhata v. Nawab of Murshidabad*.

thereof for the last three years for which accounts have been made up."

The present case relates to a notified mine, and, therefore, according to the new sub-section (2) of S. 72, notice in the form in Sch. EE would be necessary. The Subordinate Judge seems to think that no such notice was issued. He relies on the following statement of P. W. 2 who is an accountant in the plaintiff's estate:

"The Cess Department did not issue any notice to the plaintiff calling on him to furnish returns showing despatches of minerals."

I very much doubt whether on this statement of P.W. 2 it can be definitely held that no notice was issued in the form in Sch. EE. But assuming that no such notice was issued, the fact remains that the plaintiff did submit returns and the Collector accepted those returns and assessed cess accordingly. And the plaintiff made payments according to that assessment. Under the provisions of the leases the defendants were required to pay cess that might be assessed. It is suggested by Dr. Mitter that unless the assessment was in accordance with the provisions of the law, the defendants would not be liable to pay cess to the plaintiff under the terms of the leases. I am unable to accede to this contention. In my opinion the plaintiff is entitled to recover cess for the years 1936-37 to 1938-39. The amounts for these years, as found by the learned Subordinate Judge, are Rs. 104-14-0 for 1936-37 Rs. 117-7-0 for 1937-38 and Rs. 67-5-0 for 1938-39. I shall now deal with cross-objection. The point taken by Dr. Mitter is that the claim being in respect of two separate leases, the suit is not maintainable. Though there are two leases, it is quite clear, if they are read together, that they relate to the same mine and the second lease is supplementary to the first. The first lease was in respect of 200 bighas "within the entire boundaries of mouza Karmatar", and the lands were described not with reference to the plots but with reference to the boundaries which were mentioned at the foot of the deed. It appears from the second lease that the first lease had been granted on the understanding that if it was found to include a larger area, the lessees would have to take a new lease for such area. From the second lease it further appears that on measurement the area in possession of the defendants was found to be 246 bighas 7 ch. that is to say, 46 bighas 7 ch., in excess. The second lease shows that an additional salami was paid for this excess 46 bighas. The schedule attached to the second lease, however, gives a description of the entire 246 bighas 7 ch.

with reference to the plot numbers and their respective areas, and it is not possible to distinguish the plots covered by the first lease from those covered by the second. Then there is the following important recital in the second lease: "to hold the said premises hereby demised unto the lessees from the 3rd day of October 1912 for 999 years." This shows that the lease was to take effect from 3rd October 1912 which is the date of the first lease. The terms as to payment of royalty, cess, etc., are the same in both the leases. In the circumstances, it is not possible to hold that the suit is not maintainable because it includes claims in respect of both the leases. The cross-objection, therefore, fails and must be dismissed with costs.

In the result, I would allow the appeal in part and modify the decree of the Court below to this extent that, besides the amount decreed by the Court below, the plaintiff will get a decree on account of cess for an additional sum of Rs. 313-5-0, that is to say, Rs. 23-11-0 for 1918-19, Rs. 104-14-0 for 1936-37, Rs. 117-7-0 for 1937-38 and Rs. 67-5-0 for 1938-39. The plaintiff will also be entitled to interest on the total amount of cess decreed at 6 per cent. per annum from the date of the institution of the suit up to this date. Future interest will run on the entire decretal amount at 6 per cent. per annum until realization. The parties will get their respective costs in the appeal in proportion to their success. The costs in the cross-objection will be payable by the contesting respondents to the appellant.

Shearer J. — I agree.

G.N.

Appeal partly allowed.

[*Case No. 67.*]

A. I. R. (33) 1946 Patna 158

AGARWALA AND IMAM JJ.

Kumanchand and another — Petitioners
v.

Emperor.

Criminal Revision No. 725 of 1945, Decided on 27th August 1945, from order of Sessions Judge, Shahabad, D/- 17th April 1945.

(a) Defence of India Rules (1939), Rule 81 (2), Proviso, clause (i)—Bihar Government Orders No. 11277 of 16-8-1943 and No. 14718 of 5-11-1943 prohibiting or restricting export of articles from Bihar to places outside India cannot be given effect to.

Under the provisions of clause (i) of the proviso to Rule 81 (2), as amended on 18-5-1943, a Provincial Government has no power to prohibit or restrict the export of articles or things from any place in the Province to any place outside India. In so far, therefore, as the Bihar Government

Orders No. 11277 dated 16-8-1943 and No. 14718 dated 5-11-1943 prohibit or restrict the export of articles or things from any place in Bihar to places outside India they cannot be given effect to.

[P 159 1, 2; P 160 C 1]

(b) Defence of India Rules (1939), R. 3 (1) — Nepal is outside India.

Nepal is outside India within the meaning of the Defence of India Rules, R. 3 (1) read with Section 3 (27) of the General Clauses Act, 1897. [P 160 C 1]

Prem Lal — for Petitioners.

Government Advocate — for the Crown.

Agarwala J. — The two petitioners have been sentenced to three months rigorous imprisonment each and to pay a fine of Rs. 300 each under R. 81 (4), Defence of India Rules, for contravening the provisions of two Notifications issued by the Provincial Government in exercise of powers conferred by R. 81 (2) (a). The petitioners are traders residing in Nepal. On 18th September 1944, at about 2 A. M. 6 bullock carts containing four bundles of cotton cloth and two bags of pulse were in course of transport into Nepal without permit. The cloth and pulse belonged to the petitioners, but were seized by the police on duty on the Nepal frontier. The Magistrate who tried the petitioners was under the impression that the accused had pleaded guilty. This, however, was not so. When the charges had been framed and the accused called upon to plead to them, they pleaded not guilty. The prosecution then led evidence in support of the charges, and, after the close of the prosecution case, the petitioners were questioned by the Magistrate under s. 342, Criminal P. C. The question put to the petitioner Chuni Lal was: "On 18th September 1944, were you exporting to Nepal cloth in bullock carts without a permit?" His answer was: "Yes, I plead guilty. I was unaware of the restrictions." The question put to the petitioner Kumanchand was: "On 18th September 1944, were you exporting to Nepal one bundle of cotton cloth and two bags of pulse in bullock carts without a permit?" His answer was: "Yes, I plead guilty. I was unaware of the restrictions." The answers which the petitioners gave to the specific questions put to them must be regarded merely as an admission of the fact, namely, that they were exporting cloth without a permit and not as an admission that such export amounted to an offence, for they had already pleaded not guilty to the charges framed against them. According to the prosecution it was, at the relevant time, an offence for any person to export foodstuff from any district in Bihar to any place outside the Province of Bihar, or to export cloth from district in

Bihar to any part of Nepal without the written permission of the District Magistrate. The prosecution relies on the Provincial Government's Notification No. 11277, dated 16th August 1943, and No. 14718, dated 5th November 1943, respectively, the former prohibiting the export of foodstuff from any district in Bihar to any place outside the Province of Bihar, and the latter prohibiting the export of cloth from any district in Bihar to any part of Nepal without the written permission of the District Magistrate. These Notifications were issued under Rule 81 (2) (a), Defence of India Rules, which empower the Central or Provincial Government to make orders for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever. It is noticeable that clause (a) does not specifically mention export, although, possibly, export could be regulated or prevented by any order prohibiting the movement or transport of goods. Prior to the issue of the two Notifications in question the Central Government issued Notification No. 5-D. C. (19)/43, dated 1st May 1943, adding the following proviso to sub-r. (2) of R. 81 :

"Provided that no order made, whether before or after 1st May 1943, in exercise of the powers conferred by clause (a) of this sub-rule on a Provincial Government shall have effect so as to prohibit or restrict the export from any place in the Province to any place outside India of any articles or things."

The addition of this proviso to sub-rule (2) clarified the position with regard to the export of goods to places outside India by making it clear that the Provincial Government had no power to prohibit the export of goods from any place in the Province to any place outside India. It did not, however, purport to limit the power to prohibit export from the Province to any other part of India, and there was a curious anomaly in the proviso. It referred only to orders made before or after 1st May 1943, and not to any order that might have been made on 1st May 1943. This was rectified by Notification No. 5-D. C. (28)/43, dated 18th May 1943, which substituted a new proviso for the proviso which had been added to the rules on 1st May. This new proviso of 18th May 1943, was as follows :

"Provided that (i) No order made, whether before, on or after 18th May 1943, in exercise of the powers conferred by clause (a) of this sub-rule on a Provincial Government shall have effect so as to prohibit or restrict the export from any place

in the Province to any place outside India of articles or things; (ii) No order made before, on, or after 18th May 1943, in exercise of the powers conferred by cl. (a) of this sub-rule on the Provincial Government of Assam, Bengal, Bihar or Orissa shall have effect so as to prohibit or restrict the movement, transport, distribution, disposal or acquisition of any foodgrains or their products; (iii) The powers conferred by clause (b) of this sub-rule on the Provincial Government of Assam, Bengal, Bihar or Orissa shall not be exercisable in relation to any foodgrains or their products and all orders made, whether before, on or after 18th May 1943, in exercise of those powers shall cease to have effect in so far as they relate to any foodgrains or their products."

The reference to clause (b) of R. 81 (2) in cl. (iii) of the proviso refers to the power conferred on the Provincial Government to control the price or rates at which articles or things of any description whatsoever may be sold or hired. Clause (i) of the proviso maintains the limitation originally imposed on the Provincial Government by the notification of 1st May by taking it out of the powers of the Provincial Government to prohibit or restrict the export of articles or things from any place outside India. It applied to all Provincial Governments and to all articles and things, but it did not purport to affect orders made by a Provincial Government prohibiting or restricting export from a Province to any other part of India. Clause (ii), on the other hand, like cl. (iii) applied only to the four Provincial Governments of Assam, Bengal, Bihar and Orissa and only to foodgrains or their products. The effect of it was to render nugatory all orders of these four Provincial Governments prohibiting or restricting the movements, transport, etc., of foodgrains, whether such orders purported to prohibit, movement, transport, etc., within a Province or from a Province to another part of India, or from a Province to any place outside India.

Clauses (ii) and (iii) were cancelled by the Central Government's Notification No. 1427 dated 14th August 1943, with the result that from that date the Provincial Governments were free to exercise all the powers conferred on them by R. 81 (2) (a) and (b), subject, still, however, to the provisions of cl. (i) of the proviso, i. e., no order of a Provincial Government, whether made before, on or after 18th May 1943, could have the effect of prohibiting or restricting the export of articles or things from any place in the Province to any place outside India. In so far, therefore, as the Provincial Governments' orders, No. 11277 of 16th August 1943, and No. 14718 of 5th November 1943,

prohibit or restrict the export of articles or things from any place in Bihar to places outside India, they cannot be given effect to. The only question that remains to be considered is whether Nepal is outside India. Rule 3 (i), Defence of India Rules, declares that the General Clauses Act, 1897, shall apply to the interpretation of the rules as it applies to the interpretation of a Central Act. Section 3 (27), General Clauses Act, declares that "India" shall mean British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time after ascertaining the views of the Central Government and the Central Legislature, declare to be part of India. This is also the definition of "India" in S. 311 (1), Government of India Act, 1935. It was conceded that Nepal is not under the suzerainty of His Majesty, and we have been shewn no evidence that His Majesty in Council has declared it to be a part of India. Nepal, therefore, is outside India within the meaning of the Defence of India Rules. It follows that no order of the Provincial Government can have effect so as to prohibit or restrict the export of articles or things to Nepal. The attempt of the appellants, therefore, to export cloth and pulse to Nepal did not constitute an offence and their convictions and sentences must be set aside. The fines, if paid, will be refunded.

As the learned Government Advocate suggested that there might be in existence an order of the Central Government cancelling proviso (1) of the notification of 18th May 1943, we postponed the pronouncement of judgment in this case to afford him an opportunity of ascertaining whether this was so. No order cancelling the first clause of the proviso has been brought to our notice.

Imam J.—I agree.

N.S./D.H. *Convictions set aside.*

[Case No. 68.]

A. I. R. (33) 1946 Patna 160

VARMA AND PANDE JJ.

Girja Suri — Petitioner

v.

Emperor.

Criminal Revn. No. 637 of 1945, Decided on 8th August 1945, form order of Sessions Judge, Monghyr, D/- 7th March 1945.

Arms Act (1878), Ss. 19 (f) and 29—Offence under S. 19 (f) — Proceedings started without

sanction under S. 29—Sanction under S. 29 subsequently obtained—Proceedings are null and void.

The requisite sanction under S. 29 is a condition precedent for the institution of a proceeding in respect of an offence under S. 19 (f). Proceeding instituted without such sanction is null and void. [P 162 C 2]

The accused was charged with an offence under S. 19 (f) and was produced before the Magistrate on 25th June 1944. The charge sheet under S. 19 (f) was filed on 8th July 1944. The sanction of the District Magistrate under S. 29 was received on 16th August 1944 when prosecution witnesses were directed to be summoned :

Held that the proceedings against the accused were clearly instituted without the requisite previous sanction under S. 29 and, therefore, were null and void: ('45) 32 A. I. R. 1945 F. C. 16, *Rel. on.* [P 162 C 2]

S. N. Sahay and S. K. Mazumdar —

for Petitioner.

C. P. Sinha for the Government Advocate —

for the Crown.

Varma J. — This is an application on behalf of one Girija Suri who has been convicted by a first class Magistrate of Monghyr under S. 19 (f), Arms Act, and sentenced to eighteen months' rigorous imprisonment. The charge against the petitioner was that: "You on or about 10th June 1944, at Asarganj, Police Station Tarapur, were found in possession of two revolvers, two cartridges and one empty revolver case without licence or lawful authority." On that day, i. e., 10th June, P. W. 1, an Inspector of Police, received information from a spy that the petitioner and others assembled in the house of one Sukh Nandan Chaudhuri at Asarganj and that they had arms and ammunitions in their possession. A raid was arranged by the police, and the party included the Additional Superintendent of Police, a Sergeant Major, a Sub-Inspector of Police and others. The police-truck left Monghyr at 5 P. M. and reached Asarganj at about 7.30 P. M. They surrounded the house which they wanted to raid and made two arrests. After the arrests they saw the present petitioner escaping out of the back door of Sukh Nandan's house, and they rushed at him. The petitioner took out a loaded pistol (Ex. I) but was overpowered by constable Laldeo who threw him down. This pistol was handed over to Raghunandan Singh, Sub-Inspector. When a search was made of his person another revolver (Ex. II) was found wrapped in a shirt (Ex. III). An empty revolver-case was also found in the pocket of the shirt. Some cartridges, corks besides some reddish powder and a knife were also found. All the materials were entered in the search list (Ex. 1). A Fard-Beyan (Ex. 2) was drawn up on the basis of which the preliminary in-

vestigation started. Ultimately a charge sheet was submitted on 8th July 1944. The trial Court accepted the evidence adduced on behalf of the prosecution and was of the opinion that it was not possible in the face of the prosecution evidence to accept the evidence adduced on behalf of the defence. The learned Magistrate accordingly convicted the petitioner as already stated, and an appeal from the decision has been summarily dismissed by the learned Sessions Judge.

It may be mentioned that the police party had not obtained any warrant for the search, nor were there any witnesses to the search. This matter is of importance in view of the defence taken up by the petitioner that the whole of this story that he was in possession of the materials was false. It was also noticed by the trial Court that the petitioner was produced before a Magistrate fifteen days after his arrest and no explanation for this delay in producing the accused was offered by the Police. The learned Magistrate suggests in his judgment that perhaps the Police were exercising their powers under the Defence of India Rules; but he has himself observed that there was nothing on the record to show that the petitioner was detained by the Police in exercise of any of those powers. Apart from the irregularities already stated, it has been pointed out by the learned counsel for the petitioner that the procedure followed in this case makes the trial null and void. In order to appreciate this point, it is necessary to set out some more facts as they appear from the order sheet of the trial Court. On 25th June 1944, six persons including the present petitioner were received by the Magistrate and he ordered them to be remanded to *hajat* till 9th July 1944. On the same date there was a prayer by the Police to segregate the petitioner in the Bhagalpur Central Jail for certain reasons stated by them, and the Magistrate directed that the petitioner be kept in the Court *hajat* till sufficient guard was available to escort him to Bhagalpur. On 29th June, the accused persons were enlarged on bail of Rs. 400 each. On 9th July, the date that was fixed on the first day, the order sheet says "No report received from the Sub-Inspector. Takid for 23-7-44. Accused as before." On the 10th July 1944, the order is:

"Charge sheet under S. 19 (f), Arms Act, received against Girja Sao. To my file for disposal. Accused is in Bhagalpur Jail. B. C. to issue production warrant against him for date fixed."

Then on 12th July 1944 the order is "Summon prosecution witnesses on receipt of

District Magistrate's sanction. Issue production warrant to Bhagalpur Jail for 1-8." On 1st August, another Magistrate noted in the order sheet as follows:

"The trying Magistrate is out on tour. District Magistrate's sanction not received. Ask Court Sub-Inspector to obtain the same before the prosecution case starts. Put up on 16-8-44."

On 16-8-44 the order is : "District Magistrate's sanction received. Summon prosecution witnesses for 1-9-44. Accused as before." The subsequent orders are the usual orders till judgment was delivered in the case. On these facts it is urged that, apart from the irregularities as to the search, the provisions of S. 29, Arms Act, have not been complied with. That section provides as follows :

"Where an offence punishable under S. 19, cl. (f) has been committed within three months from the date on which this Act comes into force in any province, district or place to which S. 32, cl. (2) of Act 31 [XXXI] of 1860, applies at such date, or where such an offence has been committed in any part of British India not being such a district, province or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the District or, in a presidency-town, of the Commissioner of Police."

According to S. 29 of the Act, therefore, no proceeding shall be instituted without the previous sanction of the District Magistrate. The question is whether the proceedings were instituted in this case without such previous sanction. It will be noticed that in the present case the proceedings started against the petitioner on 25th June 1944, when he was produced before the Magistrate, the proceedings went on till 1st August 1944, when the Court Sub-Inspector was directed to obtain the sanction of the District Magistrate, and that sanction was received by the trial Court not until 16th August 1944. The case in A. I. R. 1945 F. C. 16,¹ gives us ample guidance in disposing of the point raised by the learned counsel. That was a case under the Drugs Control Order, 1943, and there the question arose whether on the facts of that case the prosecution had been initiated without the sanction of the proper authority and what would be the effects of the sanction having been obtained after the proceedings had already been started. The prosecution in that case was for contravention of the provisions of cl. 9 (a) and 13 (d), Drugs Control Order, 1943. But cl. 16 of the Order lays down :

"No prosecution for any contravention of the provisions of this Order shall be instituted without

1. (1945) 32 AIR 1945 F. C. 16 : I. L. R. (1945) Kar F. C. 21 : (1945) F. C. R. 93 : 218 I. C. 449 (F. C.), Basdeo Agarwalla v. Emperor.

the previous sanction of the Provincial Government."

The appellant in that case was produced before the Chief Presidency Magistrate on 2nd May 1944 and a chalan under Rr. 81 (4) and 121, Defence of India Rules, was filed on that date. Thereupon the Magistrate made an order transferring the case to another Magistrate. Later on, on the same day, the appellant was brought before the Magistrate who adjourned the case to 16th May 1944 for evidence and made an order directing that the appellant should furnish bail of Rs. 200 to appear on 16th May. On 16th May it was noted in the order sheet that sanction to prosecute had not been received. Nonetheless the Magistrate made further orders that the case be adjourned to 24th May for evidence, that the prosecution witnesses be summoned for that day, and for bail as before. Against the entry in the order-sheet on 24th May 1944, a note appeared in the margin saying "sanction filed" and the record proceeded that three prosecution witnesses had been examined. Then there was a further adjournment order and thereafter the case proceeded in the usual course up to the stage of judgment. In such circumstances of the case, their Lordships of the Federal Court observed that, "It would appear that when the absence of sanction was noted, it was considered to be a matter of little importance, which it could be assumed would be put right in due course, and which should not interrupt the ordinary course of a prosecution. In our view, the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not be so regarded either by police or officials. There may well be technical offences committed against the provisions of such an order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover, in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to

sanction a prosecution which has in fact already been started."

Referring to cl. 16 of the Order, their Lordships observed :

"In our judgment the words of Cl. 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceedings should be commenced *ab initio*. Only so can the protection intended for the citizen be assured. In our judgment the prosecution in this case was clearly instituted without the previous sanction required by Cl. 16, and it is not possible to sever the proceedings prior to 24th May from those occurring on and after this date. Consequently, as when the sanction was obtained, no new start was made, the whole proceedings in this case are null and void."

In this view of the case, their Lordships allowed the appeal and directed that the whole proceedings against the appellant be quashed for want of jurisdiction. In the case before us, I have already set out the provisions of S. 29, Arms Act, under which previous sanction of the District Magistrate was required to proceed against the petitioner under S. 19 (f) of the Act. The proceedings were clearly instituted against the petitioner without the requisite previous sanction which was imperative. The proceedings started on 25th June 1944, and the sanction was received on 16th August 1944, and it is not possible to sever the proceedings prior to the date of the receipt of the sanction. The whole proceedings, therefore, in this case are null and void. I would, therefore, make the rule absolute, set aside the conviction and sentence, and direct that the petitioner be discharged from the bail bond.

Pande J. — I agree.

G.N./D.H.

Rule made absolute.

[Case No. 69.]

A. I. R. (33) 1946 Patna 162

MEREDITH J.

Rameshwar Lal Darolia and others
Petitioners

v.

Emperor.

Criminal Misc. Nos. 295 and 296 of 1944, Decided on 2nd November 1944.

(a) Defence of India Rules (1939), R. 130—Report in writing of facts is necessary—Report need not allege contravention by particular person.

Rule 130 does not say that a charge of contravention must be made by a public servant before cognizance can be taken; it merely says that there must be a report in writing of the facts constituting

such contravention. The rule does not require a specific report alleging contravention by any particular person and it is open to the judicial officer who receives the report to form his own opinion as to whether these facts constitute a contravention by any particular person, named, or unnamed, and if so to order prosecution of that person. Cognizance is taken of cases, not of persons. [P 163 C 2; P 164 C 1]

(b) Criminal P. C. (1898), S. 526 — Grounds for transfer—Superior revenue officer of trying Magistrate expressing himself in very strong terms with regard to guilt of accused is sufficient ground.

The High Court will not hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his revenue superior on whose inquiry and report the case has been started: ('42) 29 A.I.R. 1942 Bom. 316, *Foll.* [P 164 C 1]

Cr. P. C.—

('41) Chitale, S. 526, Note 5, Pt. 33.

('41) Mitra, Page 1710.

G. P. Das, *Pitamber Missir and Sambhu B. Pd.*—for Petitioners.

Rajkishore Pd.—for the Crown.

Order. — Cases under Rule 81 (4), Defence of India Rules, are pending against the petitioners in the Court of a Magistrate at Monghyr. These rules have been issued on applications of petitioners for quashing the proceedings, or, in the alternative, for transferring the cases to any district other than Monghyr.

In application No. 295 the petitioner Ramkishun Das is the proprietor of a Lakhisarai firm known as Badridas Jainarain, Agents of the Caltex Oil Co., at Lakhisarai. The petitioner Rameshwar Lal Darolia is the manager of the said firm. In application No. 296 the petitioner Basant Lal Singhanian is the ex-Secretary of the Local Price Advisory Committee (Economic Advisory Council), Lakhisarai. The cases pending against them are on allegations made by the servant of a Barbigha firm, Messrs. Dhani-ram Madanmohan, licensed dealers in kerosene oil, to the effect that the agents declined to give them their monthly quota of kerosene oil because they did not agree to pay Rs. 20 per tin extra over the controlled rates, and secondly, that they kept incorrect accounts by entering oil supplied, in one register in November, and in another register in December, so as to make it appear that one delivery of oil was really two. The petitioner Basant Lal Singhanian is accused of abetting these offences by writing certain letters which it is said were not *bona fide* and showed that the Secretary was in league with the firm and connived at profiteering.

I do not wish to enter any further into the facts, because there is the danger that anything I might say, no matter how care-

fully worded, might tend to prejudice the trials one way or the other. It is enough to mention that allegations of fact have been made; and out of the several officers who enquired into them, some have reported unfavourably to the petitioners. It is, therefore, proper that these allegations should be put to the test in a regular trial. In the case of the proprietor of the firm and the manager, no real ground has been put forward for quashing the proceedings. In the case of the ex-Secretary, however, a point of law has been made. Rule 130 of the Defence of India Rules provides that no Court shall take cognizance of any alleged contravention of these Rules, except on a report in writing of the facts constituting such contravention, made by a public servant. As regards the firm and its manager, there was the report of the local Sub-Registrar, a Public Servant, and President of the Price Control Committee, Lakhisarai, this officer having made the first enquiry into the allegations. It is pointed out, however, that in none of the officers' reports made by the several officers who enquired into the matter has any specific allegation been made against the ex-Secretary. It is contended, therefore, that in his case there was no report under R. 130, by a public servant, and the learned Subdivisional Officer had no jurisdiction to take cognizance.

There is, I consider, an answer to this contention. Though no allegation was definitely made by any public servant, the facts relating to him were reported by at least one of the enquiring officers, namely, Mr. B.N. Singh, Deputy Magistrate, in his report of 25th March 1944. He stated that the Caltex Agent had argued before him that he withheld the quota of the Barbigha firm on the instructions of the Secretary, Economic Advisory Committee, Lakhisarai. He further expressed the opinion that the Secretary, Economic Advisory Council, without any jurisdiction whatsoever, had disallowed the quotas to be issued to the Barbigha dealers. He said that the Secretary had referred to a certain circular letter on the basis of which he had disallowed the quota, but that circular obviously did not vest any such powers in the Secretary. He did not definitely express the opinion that the Secretary had abetted any criminal offence, nor did he recommend the prosecution of the Secretary. In the view I take of R. 130, however, that was not necessary.

This rule does not say that a charge of contravention must be made by a public ser-

vant before cognizance can be taken; it merely says that there must be a report in writing of the facts constituting such contravention. The learned Sub-divisional Officer had the facts before him, and on the facts in the report he took the view, rightly or wrongly, that these facts disclosed abetment by the Secretary of contravention of the rules. That, in my judgment, was enough to empower him to take cognizance. I repeat, it is a report of the facts that the rule makes necessary, not a specific report alleging contravention by any particular person. It is, I think, open to the Judicial Officer who receives the report to form his own opinion as to whether these facts constitute a contravention by any particular person, named or unnamed, and, if so to order prosecution of that person. Cognizance is taken of cases, not of persons. As an example of what I mean, a case of theft may be reported against persons unknown. Once cognizance has been taken of this case it is open to the Court to proceed against any person whom the evidence subsequently discloses as responsible for the theft, even though there may have been no report against that person in particular. I cite this merely as a hypothetical example to make any (*sic*) view clear. My attention has been drawn to the Bombay case in *Purushottam Devji v. Emperor* (A. I. R. 1944 Bom. 247¹). But, in my opinion, nothing has been laid down in that case inconsistent with the view I have taken. I hold that there was no want of jurisdiction to take cognizance as against any of the petitioners.

As regards the quashing of the proceedings the applications must fail. As regards transfer, the matter is different. The learned Subdivisional Officer in his order taking cognizance has expressed himself in very strong terms with regard to the guilt of the petitioners. The allegation that in this order he has pre-judged the cases cannot be said to be without substance. The Magistrate before whom the cases are pending is directly subordinate to the learned Sub-divisional Officer. This is, in my judgment, sufficient reason why this Magistrate should not try the cases, and indeed, why no Magistrate subordinate to the learned Sub-divisional Officer should try these cases. A question of principle is no doubt involved, a principle which if once accepted may have wide repercussions. Nevertheless I have no hesitation in expressing the opinion I have just

done. In *Emperor v. Adambhai Abdulla-bhai* (A. I. R. 1942 Bom. 316²) it was observed by a Bench of the Bombay High Court that the High Court will not hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his revenue superior on whose enquiry and report the case has been instituted. I would respectfully quote as exactly expressing my own opinion the words of Sir John Beaumont in that case. He says:

"The learned Government Pleader says that to transfer a case in such circumstances is to introduce a dangerous principle. But I think the dangerous principle is the non-separation of executive and judicial functions; and so far as I am concerned, as long as those functions are not separate, I shall never hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his (revenue) superior."

The learned Subdivisional Officer has definitely expressed and recorded his opinion that the Secretary is in league with the Agent and prepared to fabricate papers in prosecution of "the common game of serious profiteering and black-marketing." He has expressed the opinion that the pleas taken by the Agent and the Secretary are all bogus, and stated in detail his grounds for this opinion and one plea he expressly characterises as false, and he winds up by saying that the materials placed before him "*prima facie* prove dishonest game on the part of the proprietor of the firm Messrs. Badridas Jainarayan, Lakhisarai, and Manager Rameshwar Lal Darolia and Basant Lal Singhanina, the Secretary." "The part played by the Secretary" he says "shows that he abetted the commission of the offence by the proprietor and the managers." After this the position of any subordinate Magistrate of the District called upon to try the case could not but be embarrassing.

As regards transfer, therefore, I make these rules absolute and direct that the cases be transferred to the District Magistrate of Patna, the neighbouring district, for disposal by himself or any Magistrate subordinate to him in accordance with law.

G.B./D.H.

Case transferred.

2. ('42) 29 AIR 1942 Bom. 316 : 203 I. C. 257.

1. ('44) 31 AIR 1944 Bom. 247: ILR (1944) Bom. 429.

[Case No. 70.]

A. I. R. (33) 1946 Patna 165

MEREDITH J.

*Sheikh Yaruddin and others—**Defendants—Petitioners*

v.

B. Das—Plaintiff—Opposite Party.

Civil Revn. No. 302 of 1943, Decided on 7th August 1944, from order of Munsif, 1st Court, Kishanganj, D/- 9th June 1943.

(a) Civil P. C. (1908), S. 151 and O. 9, R. 9—Application for restoration of suit dismissed for default—Application should be dealt with under O. 9, R. 9—No inherent power under S. 151, to restore suit.

A Court has no jurisdiction to resort to inherent powers under S. 151, when there is a specific provision for dealing with a case. Thus, a Court should not order the restoration of a suit dismissed for default, under S. 151, when the application for restoration can be dealt with under O. 9, R. 9.

[P 165 C 2]

C. P. C.—

('44) Chitaley, S. 151, N. 2, Pt. 20.

('41) Mulla, O. 9, R. 9, Page 640, Note 'Inherent power . . . for default.'

(b) Civil P. C. (1908), S. 115 and O. 9, R. 9—Suit dismissed for default—Order restoring suit passed though no sufficient cause for non-appearance was shown by plaintiff—Case taking dilatory course due to numerous adjournments—Order of dismissal coming as a surprise—Held order of restoration was justified by circumstances of case—High Court refused to interfere in revision.

An application under O. 9, R. 9 was made by a Receiver plaintiff for restoration of his suit dismissed for default. The Court found that no sufficient cause for non-appearance was shown by the plaintiff but nevertheless it ordered the suit to be restored merely because it thought that the estate which the Receiver represented could not equitably be penalised for the Receiver's negligence and justice would be better done by restoring the suit and compensating the defendants in costs. From the record of the case, it was evident that numerous adjournments were given to the parties for one reason or the other and the case had not proceeded to an advanced stage during the course of one year. On the date of the last hearing, the plaintiff's counsel wanted time but the application was rejected and he was ordered to proceed with the case at once. The counsel stated that he had no further instructions upon which the case was dismissed for default. On revision from the order of restoration :

Held that the practice of giving adjournments was productive of slackness on the part of the litigants and, therefore, it was a sufficient reason for the plaintiff not being ready on the date of hearing. The order of dismissal was sprung as a matter of surprise to the plaintiff when he was lulled into security that the case would not be taken on the date of hearing. In the circumstances the order of restoration was proper and just. [P 167 C 1]

Held further that interference in revision being discretionary the High Court would not interfere with the order which was justified in the circumstances of the case though it was not supported by the finding of the Court below. [P 167 C 1]

C. P. C.—

('44) Chitaley, O. 9, R. 9 N. 8 and N. 13.

('41) Mulla, O. 9, R. 9 Page 640, Note "Sufficient cause."

(c) Practice—Adjournment—Mode of granting adjournments stated.

Suits should not be fixed for hearing month after month when there is no prospect of their being actually heard. Only sufficient work should be fixed each day to ensure a reasonable prospect of its being done. The Court itself should watch its diary and see that the cases are fixed accordingly. Where necessary, long adjournments should be given without hesitation, to achieve this purpose. There is no need to be frightened of long adjournments. Better one effective adjournment for six months than six ineffective adjournments. That having been done, if applications for time are put in, the order sheet should invariably indicate that they have really received the consideration of the Court. The grounds put forward for asking for adjournment should invariably be set out in the order-sheet and the Court's reasons for allowing the adjournment. If the real reason is that the Court has no time, that should be stated. Lastly, where a suit has unfortunately taken a long and dilatory course it should never be taken up for hearing until the parties have been given a sufficiently long and definite warning by the Court that it is really intended to take up the case on the next date fixed. [P 167 C 1]

Yasin Yunus and S. S. Asghar Hussain—

for Petitioners.

S. N. Dutta and A. H. Fakhruddin—

for Opposite Party.

Order.—In this application the defendants to a title suit ask for revision of an order allowing an application under O. 9, R. 9, Civil P. C., by the plaintiff and restoring the suit which had been dismissed for default.

The point taken is that on the learned Munsif's own findings the application should have been dismissed. He did not find the necessary facts upon which an application under O. 9, R. 9 could have been allowed. Rather, on the contrary, he held that the plaintiff had not shown sufficient cause for his non-appearance when the suit was called on for hearing. Nevertheless, he proceeded to allow the application merely because the plaintiff was a Receiver and he thought the estate which the Receiver represented could not equitably be penalised for the Receiver's negligence, and justice would be better done by restoring the suit and compensating the defendants in costs. The Munsif's order, it is said, was not one in effect under O. 9, R. 9, and could only be interpreted as the use by the Munsif of his inherent powers under S. 151, Civil P. C. He had, however, no jurisdiction to resort to S. 151, when there was a specific provision for dealing with such cases, namely, O. 9, Rule 9.

In the course of his order the learned Munsif did make observations justifying this criticism. He said :

"There can be only one opinion that this is a worst case of negligence. The facts and circumstances of the case justify to me to reject this petition."

He then goes on to say :

"It would be against justice and equity if the proprietor is punished for the fault of the Receiver. . . . I would, therefore, restore the suit on payment of Rs. 50 to the contesting defendants 4 to 6, but I hope this penalty although apparently high will be an eye opener to the Receiver and his staff in future."

It does not, however, necessarily follow that the case is one for interference in revision. The learned Munsif's criticisms of the plaintiff's conduct were, in my opinion, quite unjustified. The order-sheet indicates a state of affairs which is, I fear, only too common in the subordinate Courts, and which this Court upon the administrative side has condemned over and over again. The suit is repeatedly fixed for hearing at short intervals when there is no hope or intention of taking it up, and every one concerned really knows it. Routine applications for time are put in upon nominal grounds, and accepted without scrutiny. The parties after all can hardly be expected to bring witnesses from a distance perhaps 15 or 20 times, only to have to take them back again. Naturally the parties become somewhat slack. Then at last arrives a day when the Court happens to have some spare time, or suddenly awakens to the fact that the case is about to become year old. It then, without warning, jumps upon the parties and directs them to proceed at once. Naturally they are not ready. They are taken by surprise. When this happens, it is, of course, the plaintiff who suffers. In the absence of evidence the suit must fail. The defendant is just as unready as the plaintiff. He, however, is in a strong position. He merely has to put in a hasty *hazri* of some sort, and announces his readiness to proceed. He knows he will not actually have to prove anything, as the suit will be dismissed for plaintiff's laches.

In the light of these observations let us look at the order-sheet of the case before us. On 14th April 1942, the plaintiff filed the suit, and a substantial court-fee was paid. Then follow two dates on which the plaintiff files *hazri*; then one date on which the plaintiff takes time. Then follow no less than five more dates on which the plaintiff files *hazri*. On three of these dates the defendants took time. On the last the defendants filed a written statement. On one of these dates the defendants had been directed to pay Rs. 5

adjournment costs to the plaintiff, this payment being made a condition precedent to the acceptance of the written statement. Nevertheless, the written statement is eventually accepted without the payment of these costs. Next follow no less than eleven dates on each of which both parties apply for time. On the first ten, the order-sheet is written out by the Peshkar and time is allowed, the real reason no doubt being not that there was anything substantial in the applications but that the Court was otherwise occupied. On one of these occasions the date fixed was actually a court holiday. The eleventh date is the 8th of April 1943. The order-sheet is instructive. It will be observed that the suit is about to become year old. Both parties have filed the usual routine application for time. But now appears for the first time in the order-sheet the handwriting of the Munsif himself. The Munsif writes : "Their petitions for time are rejected as frivolous. Parties to get ready at once." Below appears in the Munsif's handwriting, "Later 10.15 a. m. Defendants 4 to 6 file *hazri*. Plaintiff does not take any steps. The plaintiff's pleader says he has no further instructions. Suit dismissed for default with costs to defendants 4 to 6." The very day the decree is drawn up and notified, namely, the 12th of April, the rehearing application is put in. Comment is hardly necessary. Both parties were evidently and not unnaturally taken by surprise, but, whereas the plaintiff could do nothing about it, the defendants could risk filing a *hazri*, which may quite well have been merely nominal. During the year which the suit had lasted, the case had been fixed twenty times. There had been at least one date every single month, and in some months more than one. It would hardly have been humanly possible for the parties to have come ready on each date fixed for hearing. They had some justification for assuming that they were not really expected to do so. I should add that while the suit was filed in April 1942, the defendants did not file their written statement until August 1942, without, as I have said, paying the adjournment costs, and as late as January 1943, after six hearing dates had been fixed, a written statement was put in by some of the defendants and issues were added to the issues already settled. A counter-affidavit has been filed on behalf of the Receiver plaintiff to the effect that in the year 1942 he had to file about 800 suits in the Purnea Courts. The state of affairs may well be imagined if repeated dates are fixed in all these cases, when there is no real intention of taking them up.

There was, in my opinion, sufficient reason for the plaintiff not being ready, and that reason is afforded by the bad system prevailing, productive, as it inevitably must be, of slackness on the part of litigants, and eventual surprise. In the circumstances the only just and equitable order that could have been passed was the restoration of the suit. It may be useful to indicate the remedies for the state of affairs disclosed. Suits should not be fixed for hearing month after month when there is no prospect of their being actually heard. Only sufficient work should be fixed each day to ensure a reasonable prospect of its being done. The Court itself should watch its diary and see that cases are fixed accordingly. Where necessary, long adjournments should be given without hesitation, to achieve this purpose. There is no need to be frightened of long adjournments. Better one effective adjournment for six months than six ineffective adjournments of the sort I have been considering. That having been done, if applications for time are put in, the order-sheet should invariably indicate that they have really received the consideration of the Court. The grounds put forward for asking for adjournment should invariably be set out in the order-sheet and the Court's reasons for allowing the adjournment. If the real reason is that the Court has no time, that should be stated. Lastly, where a suit has unfortunately taken a course like the one under consideration, it should never be taken up for hearing until the parties have been given a sufficiently long and definite warning by the Court that it is really intended to take up the case on the next date fixed.

Interference in revision is always discretionary. The learned Munsif's order in the present case upon his own findings cannot be supported. Were his findings justified, he ought to have rejected the application. But his findings are not justified, and the order he actually passed was a just order, except perhaps with regard to the amount of compensation which he made the plaintiff pay. In the circumstances the case is plainly not one where this Court could properly exercise its discretionary powers in favour of the defendants. The application is, therefore, dismissed with costs: hearing fee one gold mohur.

K.S./D.H.

Revision dismissed.

[Case No. 71.]

A. I. R. (33) 1946 Patna 167

FAZL ALI C. J. AND RAY J.

*Commissioners of Arrah Municipality
— Defendants—Appellants*

v.

*Jatendra Chandra Jain, Plaintiff and
others, Defendants—Respondents.*

Appeal No. 1209 of 1945, Decided on 22nd August 1945, from appellate decree of Sub-Judge, Shahabad, D/- 26th July 1943.

(a) Bihar and Orissa Municipal Act (7 [VII] of 1922), Ss. 107 (f) and 115 (2)—Holding belonging to three brothers — Owing to partition among them tax payable apportioned among them without notice to one of them—S. 107 (f) does not apply and apportionment is ultra vires — Brother not served with notice is however not entitled to refund of tax paid by him for his portion.

A holding within the area of a Municipality belonged to three brothers A, B and C. As a result of partition among them the holding was divided and on the application of C the tax payable for the holding was apportioned among them. The apportionment was made without any notice to A. A paid the tax for his portion of the holding and brought a suit challenging the apportionment as illegal and ultra vires and for refund of tax realised from him. It was contended that the case was governed by S. 107 (f) and no notice was necessary under S. 107, sub-s. (2) and, therefore, the absence of notice did not invalidate the assessment:

Held that as the value of the old holding remained the same and the holding was neither demolished nor destroyed, the case did not fall under clause (f) of S. 107. [P 168 C 1,2]

Held further that even assuming that there was a fresh assessment of three new holdings the assessment was ultra vires as no notice was served on A, under S. 115 (2). A was, however, not entitled to refund of the tax paid by him because as the old holding continued, he was jointly liable for the whole as well as part of the taxes payable in respect thereof. His only remedy was a suit for contribution if such a suit could be maintained in law. [P 168 C 2]

(b) Bihar and Orissa Municipal Act (7 [VII] of 1922), S. 119—Whole assessment ultra vires — Suit for declaration that assessment is not binding is not barred.

Where the whole assessment is ultra vires, the assessee can always bring a suit for a declaration that the assessment is not binding upon him. Such a suit is not barred by S. 119. [P 169 C 1]

*Sarju Prasad and Jitendra Nandan Sahay—
for Appellants.*

*C. Mukherji, D. N. Varma and Kanhayaji—
for Respondents.*

Fazl Ali C. J. — This is a second appeal by the Commissioners of Arrah Municipality, who were defendants in a suit which was partially decreed in favour of the plaintiff by the first Court and was wholly decreed by the lower appellate Court. It appears that in Circle No. 7 of Arrah Municipality there was a holding numbered 616. This

holding belonged to the plaintiff and his two brothers, Sukhendra and Nagendra (defendants 2 and 3). The holding consisted of a house and some land. It is said that there was a partition among the three owners of the holding by which part of the house was given to the plaintiff, another part to defendant 2, and the land was given to the third brother. Subsequently, Sukhendra, who was defendant 2 in the suit, applied for apportionment of taxes on the house which had been allotted to him by partition. An inquiry was thereupon made by a Municipal Commissioner under orders of the Vice-Chairman, and on the basis of that inquiry out of the total annual letting value of Rs. 600 assessed on holding No. 60, Rs. 372 was apportioned for the share allotted to the plaintiff, Rupees 228 was apportioned for the share of defendant 2, and no tax was assessed on the land allotted to defendant 3 on the ground that the land was parti. It appears that the apportionment was made without any notice being issued to the plaintiff, although it is said that no objection was filed to the apportionment by defendant 2, and that was decided in the presence of the plaintiff. The plaintiff in the present suit has challenged the apportionment as illegal and ultra vires, and he has claimed a refund of Rs. 144-10-6 which, according to him, has been realised from him by the Municipality as tax for his portion of the holding at the new rate. Both the Courts below have held that the apportionment was illegal. The first Court held that the plaintiff was not entitled to a refund, but the lower appellate Court has granted the prayer for refund. The Commissioners of the Arrah Municipality have now preferred this second appeal. It appears that in both the Courts below the appellants' contention was that the present case is governed by cl. (f) of S. 107, Bihar and Orissa Municipal Act, which provides that :

"The Commissioners may from time to time alter or amend the assessment list by reducing, upon the application of the owner or occupier, the valuation of any holding which has been wholly or partly demolished or destroyed or the value of which has been diminished from any cause."

It is contended that in such a case no notice is necessary under sub-s. (2) of S. 107, and, therefore, the absence of notice will not invalidate the assessment, provided that the case falls under cl. (f). Both the Courts below are of the opinion that the case does not fall under cl. (f), and I agree with that view. Clause (f) deals with reduction of the valuation of a particular holding, and it

applies only when the holding has been wholly or partly demolished or destroyed, or the value thereof has diminished for some reason or other. In the present case the value of the holding remains the same. Before the apportionment the assessment was fixed at a letting value of Rs. 600, and this value is still maintained, and it is neither party's case that the old holding has been either demolished or destroyed. Therefore, I hold, in agreement with the Courts below, that the present case does not fall under section 107. Mr. Sarju Prasad, who appears for the appellants, has, however, put forward a new and a very ingenious argument. He contends that this is not a case of reduction of the value of the holding, but it is a case of fresh assessment of three new holdings. Such a holding may be assessed under S. 82, Municipal Act, and such a case may also fall under S. 107, sub-s. (1), sub-cl. (a). It may be stated at once that the appellants have not proceeded in this case as if it was a case of new assessment of three holdings. They have merely proceeded to apportion the original tax of the holding among three persons. There is nothing on the record before us to show that new numbers have been given to the houses and land now in possession of the plaintiff and his two brothers. The old holding remains; only the taxes are apportioned. Mr. Sarju Prasad contends that we must look to the substance, and not to the form. But even from that point of view it would appear that the present assessment was *ultra vires*. Section 115, cl. (2) provides that :

"The Chairman shall also, in all cases in which any property is for the first time assessed or the assessment is increased, give notice thereof to the owner or occupier of the property if known."

In the present case no notice was given to the plaintiff of the alleged new assessment. As he had no notice of the assessment he could not prefer any objection. He was, however, present at the objection which was preferred by defendant 2 to the *amount apportioned* as against him. The fact, however, remains that he was never called upon to object to the assessment on the basis that it was a new assessment, and, as I have already stated, the procedure which is set out in the Act for making a new assessment was not followed. In these circumstances I agree with the Courts below that the apportionment was *ultra vires*.

It is argued on behalf of the appellants that S. 119 is a bar to the present suit. Section 119 provides that "No objection shall be

taken to any assessment or valuation in any other manner than in this Act is provided." But where the whole assessment is *ultra vires*, the assessee can always bring a suit for a declaration that the assessment is not binding upon him. The only question which now remains to be decided is whether the plaintiff is entitled to the refund of a sum of Rs. 144-10-6, or any portion of it. In my opinion, he is not entitled to any refund, because upon the view that the old holding continues he was jointly liable for the whole as well as part of the taxes payable in respect thereof. It is not contended that the amount which has been recovered from him was not due upon the holding. Therefore, the plaintiff is not entitled to a refund. His only remedy seems to lie in a suit for contribution if such a suit can be maintained in law. This second appeal is allowed in part, and it is directed that the parties will bear their own costs in this Court. The decree of the Court below as to costs will stand.

Ray J. — I agree.

D.S./D.H. *Appeal partly allowed.*

[Case No. 72.]

* **A. I. R. (33) 1946 Patna 169**

DAS AND RAY JJ.

Punia Mallah and others—Appellants
v.
Emperor.

Criminal Appeals Nos. 314 and 346 of 1945, Decided on 13th August 1945, against decision of Asst. Sessions Judge, Patna, D/- 20th March 1945.

(a) Criminal P. C. (1898), Ss. 164 (3) and 533—Non-recording of or failure to sign memorandum at foot of confession—Effect of.

Mere non-recording of the memorandum at the foot of the confession as required by S. 164 (3) or failure to sign it will not vitiate the confession if the provisions of the section have in fact been complied with and the recorded statement has been read over to the confessor and admitted by him to be correct. The defect may be cured under S. 533. [P 171 C 2]

Cr. P. C.—

('41) Chitaley, S. 164, N. 16, Pt. 3.

('41) Mitra, Page 535.

(b) Criminal P. C. (1898), Ss. 164 (3) and 533 Failure to give warning to accused that he is not bound to confess renders confession bad in law—Warning held did not comply with S. 164 (3).

The provision of the first part of S. 164 (3) that a Magistrate shall before recording any confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him, is of a substantive character and not merely a matter of form and non-compliance with it renders the confession inadmissible in evidence. The defect is not cured under S. 533. [P 172 C 2]

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The warning by the Magistrate to the accused was as follows. "It is not necessary for you to make a statement at the instigation or under the threat of the police. You say what you think yourself to say."

Held that there was not a single word in the whole of the warning which conveyed to the accused that he was not bound to make a statement and therefore the first part of S. 164 (3) was not in fact or substance complied with. [P 172 C 1]

Cr. P. C.—

('41) Chitaley, S. 164 N. 13 Pt. 5.

('41) Mitra, Page 529 N. "Warning to be given to accused."

(c) Criminal P. C. (1898), Ss. 164 (3) and 533—Failure to put questions to accused to ascertain whether he was confessing voluntarily renders confession bad and inadmissible.

The provision of S. 164 (3) requiring the Magistrate to put questions to the accused in order to ascertain whether his confession was being made voluntarily is of a substantial character and not merely a matter of form. Non-compliance with it renders the confession bad in law and inadmissible. The defect cannot be cured under S. 533: ('40) 27 A. I. R. 1940 Pat. 163, *Rel. on.* [P 173 C 1]

Cr. P. C.—

('41) Chitaley, S. 164 N. 14 Pt. 2; S. 533, N. 4, Pts. 7, 8, N. 9, Pt. 7 a.

('44) Mitra, Page 528; Page 530 N. "Questions to be put to accused."

*(d) Criminal P. C. (1898), S. 164 (3)—After recording part of confession on previous day accused produced next day—Fresh warning to accused that he was not bound to confess is necessary.

Where after recording part of his confession on the preceding day the accused is produced the next day the Magistrate before recording the confession must give a fresh warning to the accused that he was not bound to make a statement and if he did so it may be used as evidence against him, even if such warning had been given on the previous occasion. The confession recorded without giving a fresh warning is inadmissible in evidence. The defect is not cured under S. 533 : Observations of Meredith J in ('40) 27 A. I. R. 1940 Pat. 163 and ('25) 12 A. I. R. 1925 Cal. 587, *Rel. on.* [P 173 C 1; P 174 C 1]

Cr. P. C. —

('41) Chitaley, S. 164 N. 13.

('41) Mitra, Page 528.

(e) Criminal P. C. (1898), S. 164 (3) — Warning to accused — Accused must be given sufficient time to reflect whether he should make confession or not.

After warning the accused that he was not bound to make a confession and that if he did so it may be used as evidence against him the Magistrate must give the accused sufficient time to reflect whether he should make a confession or not. Time of 15 minutes is not sufficient for reflection. [P 173 C 1]

Cr. P. C. —

('41) Chitaley, S. 164 N. 17, Pt. 4.

('41) Mitra, Page 528.

(f) Criminal P. C. (1898), S. 164 (3) — Confession whether voluntary—Magistrate should take care to see from what custody accused was brought.

In ascertaining whether the confession which the accused was going to make was voluntary or not the Magistrate should take care to see from what custody the accused was brought before him. [P 173 C 1]

Cr. P. C. —

('41) Chitale, S. 164, N. 14, Pt. 3.

('41) Mitra, Page 533, N. 518.

(g) Evidence Act (1872), S. 114, Illustration (a) — Article recovered from house occupied jointly by accused and his father — No evidence as to which portion was occupied by accused and from which portion article was recovered — Article cannot be said to be in possession of accused.

Where an article alleged to have been stolen at a dacoity is recovered from a house occupied by the accused and his father and there is no evidence as to which portion of the house was occupied by the accused and which portion by the other members of the family and from which portion the article was recovered the article cannot be said to have been recovered from the possession of the accused. [P 173 C 2]

Dr. Q. N. Hassan and S. C. Chakravarty —
for Appellants.

Gopal Prasad for Government Advocate —
for the Crown.

Ray J.—These two appeals arise out of the same judgment in which, out of 14 persons on trial, the 5 appellants were convicted under S. 395, Penal Code. In Cri. App. No. 314 there is a single appellant by name Punia Mallah and in Cri. App. No. 346 there are four appellants, namely, Charitar, Bansi, Deyali and Harnandan. The occurrence took place in a thakurbari in village Mehdiganj during the night between 12th and 13th August 1943, at 1 A. M. The village is under the jurisdiction of the police-station Khajekalan which is about two miles from the place of occurrence. During that night there were only two people residing in the thakurbari, namely, Mahanth Deodhari Dass, an old man aged 70, sleeping in a room, and another Ram Lal Gareri, a man aged 50, who was sleeping on the verandah. Now, the dacoits entered inside the Math by scaling over the walls. They were about 18 or 20 in number and were armed with various weapons, bhalas, swords, pistol, daggers and lathis. They woke up Mahanth Deodhari Dass and asked him to show his wealth. He said he had no wealth. Then they threatened him with death. On this he made over the keys and with the keys they opened different rooms. First of all they opened the room of the Thakur, took away the silver mukut of the Thakur, dug certain places in the thakurghar and opened other rooms and took away various things including utensils, clothes, cash, ornaments, cigarette case, dari, blankets and some papers. Then they took the Mahanth into a room,

assaulted him with a karauli and left him with a bleeding injury on the chest inside the room and chained the room from outside. During the dacoity Ram Lal Gareri was also pushed inside a room and was being watched till the dacoity was finished. He was also confined in a room by chaining the room from outside. This place is an isolated one and was then partly cut off by the flood water, and the place could be reached only by the help of a boat. Therefore, these two inmates remained confined in the place and only in the early morning Ram Lal Gareri from inside the room heard the sound of one Baburam. He called Baburam, who came and unchained the door and Ram Lal Gareri came out. Going out for the search of the Mahanth, he found the Mahanth confined in a room. He was then released by Ram Lal. The Mahanth was in a very bad condition so he was carried on a khatoli to the police-station where the first information was lodged at about 9.30 A. M.

In the first information report no accused was named, nor was there any subsequent identification of the accused persons at the test identification parade. A list of some articles was given at the time of the first information report and Mahanth Deodhari Dass further said that his grandson Kishori Pandey had deposited certain articles with him in the Math and he could give a list of those articles later. The police arrived at the spot and carried on investigation for some time, and getting absolutely no clue, submitted a final report on 2nd October 1943. Meanwhile certain other dacoities in the neighbourhood were committed and those cases were being investigated. In the course of that investigation on 23rd October 1943, the houses of accused Deyali and P. W. 11, Mt. Tetri, were searched. From the person of Deyali a cigarette case with trade mark "Bridgestone" manufactured in Japan was found. On 24th October 1943, the houses of Bansi and Charitar were searched. From the house of Bansi a lota, Ex. IV, was recovered which was later identified to be one of the stolen articles, and from the house of Charitar a tasli which is material (Ex. I) was found which was similarly later identified to be one of the stolen articles. The house of Punia Mallah was searched on 7th Nov. 1943, and from there two articles, namely, a *thali* and a *batlohi*, Exs. II and III respectively, were recovered and they were subsequently identified to be stolen articles claimed by the complainant. On 27th and 28th October 1943, the two appellants Deyali and Harnandan confessed and

their confessional statements were recorded by a Magistrate Mr. T. N. Gupta. In the confession of Deyali all the appellants including himself and excepting Charitar, and certain other accused persons, since acquitted by the learned Assistant Sessions Judge were named. But Charitar was named by Harnandan in his confession. Recording of Deyali's confession was started on 27th October 1943, and could not be finished that day and so it was continued on the next day. On 5th December 1943, the articles seized from the houses of the appellants were identified at the test identification parade held by Mr. Rameshwar Prasad Golwar Honorary Magistrate, 2nd class. On 15th February 1944, 14 people, including the present 5 appellants, were charge-sheeted and put on trial in the Court of the Assistant Sessions Judge, Patna.

The learned Judge in the Court below acquitted 9 people and convicted these five on the evidence of the retracted confessions of the appellants Deyali and Harnandan and on recovery of articles as aforesaid from the houses or from the person of the accused persons. Now, so far as Harnandan is concerned, no article was recovered from his house. His conviction stands on his confession alone and on the confession of Deyali. The principal evidence, according to the learned trial Court, is afforded by the retracted confessions of the two persons. The eye witnesses, Deodhari Dass, P. W. 5, and Ramlal Gareri, P. W. 6, did not identify any of the accused persons at the test identification parade. The counsel for the defence in challenging the correctness of the judgment of the trial Court has laid stress upon two points, namely, that the confessions cannot be relied upon as having not been recorded in accordance with the imperative provisions of S. 164, sub-s. (3), and for his second contention, he has taken us into the evidence regarding recovery of the articles from the respective accused persons as showing that the evidence does not conclusively establish the possession of those articles by the prisoners, nor that the articles recovered are stolen properties. With regard to the confessions, his criticism is that the warning that is necessary to be given under S. 164, has not been given; secondly, that the learned Magistrate did not put questions to the accused persons concerned to elicit answers which would satisfy him that the confessions were voluntary. Beside these two, there are certain other defects, namely, that in certain paragraphs of the form for recording confession, the names and dates have not been

stated. The column which requires to record the name of the persons by whom the accused is brought before the Magistrate for the purpose of recording the confession has not been filled in, and the printed certificate at the foot of the record has also not been signed. It further appears that so far as Deyali is concerned, whatever warning the learned Magistrate gave to him, he gave it on 27th October 1943, and when the accused was again brought before him on 28th October 1943, he did not repeat the warning thinking that this confession was in continuation of the previous record and no further warning was necessary. We have carefully considered these criticisms of learned counsel for the defence, and agree with him that the defects in the record of the confession are really fatal and make the confessional statements irrelevant for the purpose of proving the guilt of the accused persons.

It has been contended by learned counsel for the prosecution that in consideration of the evidence given by the recording Magistrate, Mr. T. N. Gupta, it should be held that all the imperative formalities required by law had really been complied with, and the defects, if any, are merely of formal character. Section 164 sub-s. (3), consists of three parts. The first part requires that a Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him. The second part is that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reasons to believe that it was made voluntarily, and the third part is that when he records any confession, he shall make a memorandum at the foot of such record to the effect given in the section. Of these three parts, neither of them, in my view, has been complied with. So far as the memorandum is concerned, there is a printed memorandum at the foot of the record which has not been signed. Therefore, that part also has not been complied with, but that, at best, can be said to be a formal part. Mere non-recording of the memorandum will not vitiate the confession if the provisions of the section have in fact been complied with and the recorded statement has been read over to the confessor and admitted by him to be correct, and may be cured under S. 533, Criminal P. C., but with regard to the other two, they are of a substantial character and not merely matters of form. Now, by way of warning, the

Magistrate told the accused, before he proceeded to put the questions to elicit the statements ;

"Ham hakim hai. Police ko dhamkane se bahkane se hamare pas tum ko kuch kahaneko zarurat nahi hai. Tumara dil se jo aega ohi biyan karo. Tum jo biyan karoge gawahi men tumara khilaf a sakta hai. Ehi samajhke tum hamare pas biyan karo. Samajhgya?"

Now, this Magistrate in his deposition (Ex. A) before the Assistant Sessions Judge, Mr. Tekanath Jha, on 2nd August 1944, said: "I have not given the warning to the accused that he was not bound to make a statement." In the trial Court he wanted to explain it away by saying that he said so because he was asked *paibundi*, whereas the word he used in his questions to both the confessing accused is "zarurat". We cannot accept it. The section requires that the Magistrate shall explain to the person making it that he is not bound to make a confession. There is not a single word in the whole of his warning which conveys to the accused the sense that he is not bound to make a statement. What he says is "It is not necessary for you to make a statement at the instigation or under the threat of the police. You say what you think yourself to say." That he is not bound to say anything is not conveyed in any of these expressions. Therefore, in my view, the first part of sub-S. (3) of S. 164 has not been in fact or substance complied with. As to compliance with the second part of the sub-section, it appears quite clear from the evidence of the learned Magistrate, who recorded the confession, as well as from the record of the confession itself, that he never put any question to any of the accused persons to satisfy himself that he was making the statement voluntarily. This point is well-settled by authorities. According to their Lordships of the Privy Council in A.I.R. 1936 P. C. 253,¹ at p. 257, compliance with the provisions enacted in S. 164 (3) is a matter which confers jurisdiction upon the Magistrate to record a confession. Therefore, non-observance of them goes to the very root of the matter. Their Lordships have said :

"It can hardly be doubted that a Magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing mad man or for any other reason the Magistrate thought it to be incredible or useless for the purposes of justice. Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which

applies is a different and not less well recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts and although the Magistrate acting under this group of sections is not acting as a Court, yet he is a judicial officer and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to S. 164."

The matter also came to be considered by their Lordships Varma and Meredith JJ. in A. I. R. 1940 Pat. 163.² In that case Varma J. has said :

"On the explicit terms of S. 164, Criminal P. C., the confession (Ex. A) is inadmissible in evidence. In 6 Lah. 183³ it was held that the provisions of S. 164 (3), Criminal P. C., as amended, render it incumbent upon the Magistrate who is called upon to record a confession, to explain to the person who is to make it (a) that he is not bound to make a confession at all; and (b) that if he does so, it may be used as evidence against him; and further (c) the Magistrate should record the confession only if upon examination of the person making it he has reason to believe that it will be made voluntarily."

He, further down, says :

"In 17 P. L. T. 594: A. I. R. 1936 P. C. 253¹ their Lordships of the Judicial Committee laid down that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all; other methods of performance being necessarily forbidden."

In this view of the settled principles of law, it is quite clear that the first part of S. 164 (3), which requires a Magistrate recording a confession to give a warning to the accused that he is not bound to make a confession and that if he does so, it may be used as evidence against him, has not been complied with. Therefore, the confession must be held to be bad in law.

With regard to compliance with the second part, I cannot do better than quote the observations of Meredith J. in the same decision, A. I. R. 1940 Pat. 163.² This part requires that the learned Magistrate should be satisfied after questioning the accused that he was going to make the statement voluntarily. His Lordship said :

"The question or questions, whatever the form, must be designed to show whether the accused is making the statement voluntarily. Such questions, for example, might be : 'Are you making your statement as a result of any threat or inducement? Are you making your statement entirely of your own free will and not as a result of anything any one has said to you? What is your motive for making a statement which must incriminate you?' These are only examples. Others might be thought of. As I have said, the law does not compel any

1. ('36) 23 A.I.R. 1936 P. C. 253 : 17 Lah. 629 : 63 I.A. 372 : 163 I. C. 881 : 17 P.L.T. 594 (P.C.), Nazir Ahmad v. King-Emperor.

2. ('40) 27 A.I.R. 1940 Pat. 163 : 19 Pat. 301 : 188 I. C. 57, Emperor v. Kommoju Brahman.
3. ('25) 12 A.I.R. 1925 Lah. 432 : 6 Lah. 183 : 88 I. C. 854, Bahawala v. Emperor.

particular questions or any particular form of questions. There must be some question, and some question the answer to which will indicate whether the confession is a voluntary one. Where there was no such question, the Magistrate has no jurisdiction to record a confession, and it will not do to point to some question which may have been asked but was directed to some other end. All this follows from S. 164 itself, which says that in the absence of the question, the Magistrate shall not record the confession. He has no jurisdiction to record as a Magistrate so as to bring into operation the provisions of S. 80, Evidence Act, and, secondly, he has no jurisdiction to record a statement that he has satisfied himself that the confession is voluntary."

In this case, as I have already said, there is absolutely no question pointing to compliance with the second part of S. 164(3). On these grounds these confessions are bad in law and cannot be considered as evidence to bring the charge home against the accused persons. Beside these two, there are certain others, namely, the learned Magistrate did not give sufficient time to the accused to reflect, the time given, according to him, was only 15 minutes; nor did he take care to see that from what custody the accused persons came to him, and particularly with regard to Deyali, to what custody was he again sent back on 27th and in what custody he was before he was brought to the Magistrate on 28th. It is further noticeable that on 28th neither any warning was given to accused Deyali nor was any question put to him in order to ascertain whether his statements were being made voluntarily. The learned Assistant Sessions Judge, however, in his judgment has said that because it was in continuation, so further warning was not necessary. In my view, further warning was necessary even on 28th October, and there is some support to this view of mine from the judgment of Meredith J. in the above-mentioned case. In that case the accused was produced the next day after a part of his confession was recorded on the preceding day, and there the learned Magistrate recording the confession simply put the question: "Do you remember the warning given to you the previous day," and this his Lordship has held was not sufficient compliance with the provisions of S. 164 (3). This certainly leads to the conclusion that his Lordship thought that a fresh warning was necessary on the subsequent day even if the men had been warned on the previous occasion. On these grounds the confessional statements must be ruled out.

Then, the question is if the conviction of these persons can rest upon recovery of

what are said to be stolen articles; in this respect, I shall deal with the case of each individual accused separately. [After dealing with the case of accused Deyali his Lordship proceeded:] Charitar, as I have already said, has not been named in the confession of Deyali. The evidence against him is the recovery of one *tasli* (Ex. 1), which was recovered from his house by the Sub-Inspector (P. W. 4). The search witnesses Ramsarup Gosain and Phudi Pahalwan have not been examined. Charitar has got his father, and he claims that the *tasli* belongs to his father. In cross-examination, P. W. 4 admits that Dassain is the name of Charitar's father. His name has been written on this *tasli*, and he says: "It is not in my handwriting." He cannot further say which portion of the house was being occupied by Charitar and which portion by other members of the family, and he has kept no note as to from which portion of it this article was recovered. So this sort of possession is not a personal possession at all. Charitar and his father live jointly, and his father's name is written on this *tasli* which is not claimed to have been written by the Sub-Inspector. In the circumstances, it cannot be said that any guilt can be fixed upon Charitar on account of the recovery of this article from his house. [His Lordship dealt with the cases of the remaining accused and proceeded:] For the reasons given above, I hold that the charges have not been brought home to the accused persons, and they should be acquitted. I, therefore, set aside the order of conviction and sentences passed by the trial Court and direct that the appellants be set at liberty forthwith. The appeals are accordingly allowed.

Das J.—I agree, and would like to add a few observations regarding the two confessions of the appellants Deyali and Harnandan. The main criticism of the learned counsel for the appellants is that the Magistrate, P. W. 1, who recorded the two confessions, failed to comply with the mandatory provisions of S. 164, Criminal P. C. As far as the confession of Deyali is concerned, he made his confession on two dates, that is, 27th October 1943, and 28th October 1943. The particular dacoity with which we are concerned was mentioned on 28th October 1943, that is, on the second day. The Magistrate who recorded the confession of Deyali, has admitted that he gave no further warning to Deyali on the second day, that is, 28th October 1943. This

admission of the Magistrate shows a failure to comply with the mandatory provisions of sub-s. (3) of S. 164, Criminal P. C. That subsection requires that a Magistrate shall, before recording any confession, explain to the person making it that he is not bound to make a confession, and that if he does so, it may be used as evidence against him. It was, therefore, obligatory on the Magistrate to explain to Deyali on 28th October 1943, that he was not bound to make a confession, and that if he did so, it might be used as evidence against him. Admittedly, the Magistrate gave no such explanation to Deyali on 28th October 1943. In my opinion, this is a fatal defect to the admission of the confession alleged to have been made by Deyali on 28th October 1943. There is a clear and direct authority on this point. Learned counsel for the appellants has referred to the case in A. I. R. 1925 Cal. 587.⁴ In that case the confession was recorded on 15th and 16th December 1923. The Magistrate did not give any warning to the accused person on 16th December 1923. It was held that the statements made on 16th could not be received in evidence as having been voluntarily made. The facts of the present case are similar to the facts of the case cited above. Therefore, Deyali's confession made on 28th October 1943, is not admissible in evidence.

Even if the statements made on 28th October 1943, be held to be in continuation of the statements on the preceding day, there is still the defect that the Magistrate, P. W. 1, who recorded the confession of Deyali, did not in fact comply with the provisions of S. 164, Criminal P. C. If the failure to comply with the provisions of S. 164, Criminal P. C., amounts merely to a defect of a formal nature, the defect may be cured under S. 533, Criminal P. C. In A. I. R. 1936 P. C. 253¹ their Lordships of the Judicial Committee were dealing with a case in which the Magistrate had neither acted, nor purported to act under S. 164 or S. 364, Criminal P. C., and their Lordships expressly stated that no question of the operation or scope of S. 533 arose. In the decision of this Court, A. I. R. 1940 Pat. 163,² referred to by my learned brother, the application of S. 533, Criminal P. C., has been considered. It has been observed that S. 533, Criminal P. C., can cure a defect of formal nature and not a defect of substance. In the particular case under our consideration, the

defects which are disclosed by the evidence of the Magistrate, P. W. 1, are not mere defects of form, but are defects of substance. If the Magistrate, who recorded the confessions, had merely omitted to sign the prescribed memorandum by oversight, the defect might have been cured by giving oral evidence to the effect that the Magistrate had in fact complied with the provisions of S. 164, Criminal P. C. The Magistrate's evidence shows, however, that he did not explain to the accused persons that they were not bound to make any confession. The Magistrate merely asked the accused persons not to make any confession under instigation or threat of the police. He did not say that, apart from any instigation or threat, the accused persons were under no obligation to make a confession. This failure to comply with the mandatory provisions of sub-s. (3) of S. 164, Criminal P. C., is a defect of substance and not merely one of form. That being the position, the confessions made by Deyali and Harnandan were not admissible in evidence. Excluding the two confessions, the only other evidence against four of the appellants was the recovery of certain articles from them. The evidence regarding the recovery of those articles has been considered in detail by my learned brother, and I agree with his conclusion that the recovery of those articles does not prove their guilt.

G.N./D.H

Accused acquitted.

[Case No. 73.]

A. I. R. (33) 1946 Patna 174

BEEVOR J.

Dulhin Jagtraj Kuer

v.

Singasan Pandey.

Appeal No. 121 of 1944, Decided on 21st March 1945, from appellate order of 1st. Addl. Sub-Judge, Arrah, D/- 14th March 1944.

Bihar Tenancy Act (8[VIII] of 1885), S. 112A (1) (d)—Application by tenants for reduction of rent stated to be current and payable on date of application — Rent subsequently enhanced but again enhancement cancelled—Order of Rent Reduction Officer reducing enhanced rent and not rent stated by tenants in their application held without jurisdiction.

Certain tenants applied to the Rent Reduction Officer for reduction of rent on the basis that the current rent was Rs. 173-8-0 apart from cess and that this rent had been payable since the year 1912. The landlord appeared and contested the proceedings and his case was that the rental had originally been as alleged by the tenants but that in the year 1926 or 1927 the rental was enhanced by a suit to Rupees 195-3-0 and that subsequently the enhancement had been cancelled by mutual agreement between him and

4. (25) 12 A. I. R. 1925 Cal 587 : 52 Cal 67 : 86 I. C. 414, Emperor v. Panchkari Dutt.

the tenants. The Rent Reduction Officer accepted the case of enhancement but did not accept the case that the enhancement had been cancelled and proceeded to reduce the enhanced rent :

Held that the Rent Reduction Officer had no jurisdiction to deal with any other rental than the rental of Rs. 173-8-0 apart from cess, which was the rental stated by the tenants in their own application and which was the rental payable at the date of the application even according to the landlord and his order reducing the rental of Rs. 195-3-0 was without jurisdiction. [P 175 C 2]

M. Rahman — for Appellants.

Rai T. N. Sahai — for Respondents.

Judgment. — This is an appeal by the decree-holders against a decision of the 1st Additional Subordinate Judge of Arrah confirming on appeal an order of the 1st Munsif of Sasaram who allowed an application under S. 15 (b), Bihar Act, 9 [IX] of 1938, holding that the decree-holders were not entitled to realise the entire amount of their decree because the rental had been reduced by proceedings under S. 112A (1) (d), Bihar Tenancy Act. It is undisputed that there were proceedings before the Rent Reduction Officer Deputy Collector who passed a certain order for reduction of rent, the details of which I will consider later. This order was confirmed on appeal by the Collector. There was then an application to the Commissioner who passed the order (Ex. A-1) which was produced in this Court for the respondents and taken in evidence here. He refused to interfere with the order passed on appeal by the Collector, but on a further application to the Board of Revenue an order (Ex. A) was passed on 8th October 1942 setting aside the orders of the Rent Reduction Officer and directing that the reduction, if any, should be made on the basis of the prices current in 1938 and 1939. The lower Courts held on the basis of a decision of this Court in 1943 P.W.N. 253¹ that the order of the Board of Revenue was without jurisdiction. That decision was confirmed on appeal under the provisions of the Letters Patent and the appellate decision is reported in 1945 P.W.N. 83.² Now I do not think it is necessary to consider very closely whether the order of the Board of Revenue might be held in this case as consistent with the decision of this Court in 1945 P.W.N. 83,² because even if it is accepted that the orders of the Board of Revenue were without jurisdiction there still remains the question whether the orders of the Rent Reduction

Officer and the orders of the Collector on appeal under S. 112B, Bihar Tenancy Act, were with jurisdiction.

The following facts are apparent from the evidence on the record in this case. The tenants, who are now the judgment-debtor-respondents applied to the Rent Reduction Officer for reduction of rent on the basis that the current rent was Rs. 173-8 apart from cess and that this rent had been payable since the year 1912. The landlord appeared and contested the proceedings and his case was that the rental had originally been as alleged by the tenants but that in the year 1926 or 1927 the rental was enhanced by a suit but that from the year 1346 Fasli the enhancement had been cancelled by mutual agreement between him and the tenants. The tenants then turned round and conceded that there had been enhancement of the rental by a suit and further alleged that they had no knowledge of any cancellation of the enhancement. From the judgment of the Commissioner (Ex. A-1) it is clear that the Rent Reduction Officer accepted the case of enhancement but did not accept the case that the enhancement had been cancelled and proceeded to reduce "the enhanced rent." Now it is quite clear that there was no application before him for reduction of any such enhanced rent. The tenants had applied for a reduction of the rental of Rs. 173-8-0 though they subsequently agreed that that rental had been enhanced. The rent reduction schedule (Ex. 1) also shows that the Rent Reduction Officer purported to deal with a rent of Rs. 195-3-0. To my mind it is quite clear that the Rent Reduction Officer had no jurisdiction to deal with any other rental than the rental of Rs. 173-8-0 apart from cess, which was the rental stated by the tenants in their own application and which was the rental payable at the date of the application even according to the landlord. In the circumstances I hold that the Rent Reduction Officer had no jurisdiction to deal with the rental of Rs. 195-3-0 which he claimed to deal with and his order reducing such rent to Rs. 112-6-0 is, therefore, without jurisdiction. For these reasons the appeal is allowed and the orders of the lower Courts reducing the amount for which the decree-holders may take out execution are set aside. The appellants will be entitled to their costs in all the Courts. Leave to appeal under Letters Patent refused.

D.S./D.H.

Appeal allowed.

Advocate

1. (43) 1943 P. W. N. 253, *Radha Krishnaji v. Ramkhelawan Singh*.

2. (45) 32 A.I.R. 1945 Pat. 179 : 24 Pat. 234 : 221 I.C. 223 : 1945 P.W.N. 83, *Radha Krishnaji v. Ramkhelawan Singh*.

[Case No. 74.]

* A. I. R. (33) 1946 Patna 176

MEREDITH AND IMAM JJ.

Mathura Rai — Petitioner

v.

Mt. Marachoo Kuer — Opposite Party.

Criminal Revn. No. 537 of 1945, Decided on 3rd September 1945, from order of Magistrate First Class, Chapra, D/- 14th December 1944.

*Criminal P. C. (1898), S. 488—Question of relation can be put in issue — Magistrate has jurisdiction to decide the same.

In proceedings under S. 488, the question of relationship can be put in issue and the Magistrate has jurisdiction to decide the same. To say that once the relationship of marriage or paternity, as the case may be, is denied, S. 488 ceases to have application is to make the provisions of the section a complete nullity: *Case law reviewed.* [P 176 C 1,2]

Ganesh Sharma and Angad Ojha —

for Petitioner.

K. P. Varma — for Opposite Party.

Meredith J. — This matter has been referred to a Division Bench by a learned Judge of this Court on the ground that there is no direct decision of a Division Bench of this Court on the question raised. The question raised concerns the interpretation of S. 488, Criminal P. C. Sub-section (1) of this section is as follows :

"If any person having sufficient means neglects, or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

The petitioner has been ordered to maintain a child whom the Magistrate has held to be his illegitimate child, though the petitioner himself denies the relationship. Mr. Ganesh Sharma argues that once the relationship of marriage or paternity, as the case may be, is denied, S. 488 ceases to have application, the Magistrate has no jurisdiction, and the parties must be referred to a civil Court. In other words, he argues that the issue of relationship cannot be raised before the Magistrate.

In the first place, such an interpretation would make the provisions of the section a complete nullity. The defence would be taken in every case that the woman was not the man's wife if asked to maintain his wife or the child was not his if asked to maintain his illegitimate child. This could hardly have been the intention of the Legislature.

In the second place, for many many years

the Courts have been accustomed to allow the question of relationship to be put in issue, and women have been allowed to prove the paternity of their children when it has been denied. In the circumstances it is too late now to argue that on the strict wording of the section such an issue cannot be raised. If a direct decision of a Bench of this Court cannot be found specifically deciding the point, there are at least numberless decisions where the question has been allowed to be put in issue, and the point has never been raised. To cite some of these cases, we find, going back to 1889, that in *Arunachella Pillai v. Kamala Bai* (2 Weir 621¹) the Magistrate was criticised for not having given a distinct finding whether the alleged father of the children was in fact their father, and it was pointed out that where the question of paternity is put in issue the general rule is that the woman must be supported in some material particular, and the Magistrate must find that in all reasonable probability no one else than the opposite party could have been the father.

In *Mt. Kailasa v. Raghubar* (26 I.C. 526²) the Court held that the fact that the Magistrate holding paternity proved made an order for maintenance would not bar a subsequent suit in which the plaintiff based his cause of action upon that order, for a declaration that the defendant was not his son.

In *Hira Lal v. Saheb Jan* (18 ALL. 107³) it was held that a person against whom an order for maintenance under Sec. 488, Criminal P. C., is sought is a competent witness on his own behalf on the point of relationship. The learned Chief Justice observed :

"A woman may be of bad character and yet be entitled to an order for maintenance of her illegitimate child if she proves that the man against whom she proceeds was the father of the child."

In other words, the question of paternity could be put in issue in the proceedings.

In *Vedantachari v. Marie* (A. I. R. 1926 Mad. 1130⁴) it was laid down that in a case under S. 488 where the question at issue is, whether a certain man was the father of a certain child, it is *prima facie* improper to accept without corroboration the mere statement on oath of the mother who asserts the paternity. Here again the question was allowed to be put in issue.

1. (89) 2 Weir 621.

2. (14) 1 A. I. R. 1914 Oudh 374 : 17 O. C. 331 : 26 I. C. 526.

3. (96) 18 All. 107.

4. (26) 13 A. I. R. 1926 Mad. 1130 : 97 I. C. 359.

In *Mt. Hidayat Khatoon v. Mahomed Hayat* (14 Cri. L. Jour. 303⁵) it was laid down that when the opponent has denied the paternity of a child that is a fact from which the Court may infer neglect to maintain.

In *Mt. Mangli v. Ganda Singh*, A. I. R. 1932 Lah. 301⁶ the Court held that where on an application made by the wife for maintenance the husband denies the validity of the marriage it is for the Magistrate to decide such a question in his own Court.

In *Mt. Ganga Devi v. Ram Sarup* (A.I.R. 1939 Lah. 24⁷) the case was sent back to the Magistrate by the High Court for decision of the very issue of relationship as the issue had been raised and the Magistrate had not decided it.

It is needless to go on citing cases. If the contention now put forward were correct, all these cases would have been shortly and summarily disposed of on the ground that the criminal Court had no jurisdiction. In point of fact the scope of S. 488 has been settled by this long course of decisions extending over a great number of years, and it is too late now to ask for an interpretation which, as I have already said, would practically render the section a nullity.

The application fails and must be dismissed.

Imam J. — I agree.

N.S./D.H. *Application dismissed.*

5. ('13) 6 Sind L. R. 208 : 19 I. C. 959 : 14 Cri. L. Jour. 303.

6. ('32) 19 A. I. R. 1932 Lah. 301 : 137 I. C. 30.

7. ('39) 26 A. I. R. 1939 Lah. 24 : 179 I. C. 766.

[Case No. 75.]

A. I. R. (33) 1946 Patna 177

DAS AND RAY JJ.

Brajendra Nath Ghosh and others —
Appellants

v.

Sm. Kashi Bai and others —
Respondents.

Appeal No. 199 of 1945, Decided on 21st August 1945, from original order of Subordinate Judge, Dhanbad, D/- 5th July 1945.

(a) Civil P. C. (1908), O. 39, R. 1—Interlocutory injunction—Prima facie case for grant of — Meaning of—Title need not be established.

In order to make out a *prima facie* case necessary for granting an interlocutory injunction, the plaintiff need not establish his title. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed of. The Court

must also, before disturbing any man's legal right, stripping him off any of the rights with which law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. A mere existence of a doubt as to the plaintiff's right to the property does not itself constitute a sufficient ground for refusing an injunction though it is always a circumstance which calls for the attention of the Court.

[P 179 C 2; P 180 C 2]

C. P. C.—

('44) Chitaley, O. 39, R. 1, N. 3, Pts. 5, 6.

('41) Mulla, Page 1127, Pts. (z), (a).

(b) Civil P. C. (1908), O. 39, R. 1—Interlocutory injunction — Grant of — Essentials to be proved, indicated.

In order to obtain an interlocutory injunction it is not enough for the plaintiff to show that he has a *prima facie* case. He must further show that :

(1) In the event of withholding the relief of temporary injunction he will suffer an irreparable injury;

(2) in the event of his success in the suit in establishing his alleged legal right, the encroachment whereof is complained against, he will not have the proper remedy in being awarded adequate damages: (1895) 1 Ch. D. 287; (1911) 1 K. B. 455 and ('14) 1 A. I. R. 1914 Cal. 32, *Expl.*;

(3) in taking into consideration the comparative mischief or inconveniences to the parties, the balance of convenience is in his favour, or in other words, that his inconvenience in the event of withholding the relief of temporary injunction will in all events exceed that of the defendant in case he is restrained. This condition can, under circumstances, be so adjusted as not to deprive either party of the benefits he is entitled to in the event it turns out that the party in whose favour the order is made shall be in the wrong, by imposition of terms on one party or the other as condition of either granting or withholding the injunction;

(4) lastly, the plaintiff must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired. [P 181 C 1]

The plaintiff brought a suit for possession of certain coal lands on the ground that they were comprised in his lease and applied for an interlocutory injunction restraining the defendant from working the disputed coal lands:

Held that (1) the quantity and value of the coal that might be extracted by the defendant till the decision of the suit could be determined and, in the event of the plaintiff's success, award of compensation and damages would be full and complete remedy and, therefore, interference by a temporary injunction was not called for: (1895) 1 Ch. D. 287; (1911) 1 K. B. 455 and ('14) 1 A. I. R. 1914 Cal. 362, *Disting.* [P 183 C 2]

(2) the balance of convenience was also in favour of withholding the relief of interlocutory injunction. In case injunction was granted the working out of the coal lands would be stopped. By the time the litigation was over the existing coal market may not be there. It was more likely that market would fall as soon as war conditions disappeared. In such circumstances, the plaintiff even in the event of his success would be a great loser, because he could not call upon the defendant to pay him damages. On the other hand, if injunction was withheld and the defendant worked out the mine and derived profits those would be of the plaintiff

in the event of his success coming to him in the shape of damages or mesne profits. [P 183 C 2]

C. P. C. —

(44) Chitaley, O. 39, R. 1, N. 3, Pts. 5, 6, 8, 10, 11.

(41) Mulla, Page 1127, Pt. (y); Page 1128, Pt. (b).

(c) Civil P. C. (1908), O. 39, R. 1—Interlocutory injunction — Essentials for grant of — Irreparable injury — Meaning of.

The plaintiff, in order to obtain relief of temporary injunction, must prove that the withholding of the injunction will cause him irreparable injury before legal right claimed by him can be established.

[P 181 C 1]

Irreparable injury does not mean injury that is not physically capable of being remedied but it is such an injury which could not be adequately remedied by damages. Inadequacy of remedy by damages means that the damages obtainable by law are not such compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood.

[P 181 C 1, 2]

C. P. C. —

(44) Chitaley, O. 39, R. 1, N. 3, Pt. 9.

B. C. De and Bhabanada Mukherji —

for Appellants.

R. S. Chatterji—for Respondents.

Ray J. — This is a plaintiffs' appeal against the order passed by the Subordinate Judge of Dhanbad in Title Suit No. 16 of 1945 refusing to grant an interlocutory injunction to restrain the defendants from working the disputed coal mines. The plaintiffs in their suit claim the disputed part of the colliery as included in the lands demised as per a registered lease dated 1st Aghan 1301 B. S. granted by late Ganga Narain Singh, the then proprietor of pargana Katras, to late Ramdayal Mazumdar. The same landlord by another registered lease dated 21st Kartick 1301 B. S. leased out an adjoining plot of land in mauza Katras for the purpose of extracting coal to one Budhar Nath Roy. It is stated that a dispute having arisen about the intermediate boundary lines between the coal mines of Ramdayal Mazumdar and Budhar Nath Roy, there was Title Suit No. 32 of 1896 instituted by Ramdayal against the said Budhar Roy and Ganga Narain Singh, the proprietor, in the Court of the Subordinate Judge of Purulia. The northern boundary of the plaintiffs' leasehold land was fixed and declared, and the plaintiffs claim that this decree fixing the boundaries is binding as between the parties. The plaintiffs thus claim that the present disputed inclines in the colliery now in possession of the defendants are all within the declared boundaries of the leasehold lands of Ramdayal Mazumdar, their predecessor-in-interest, and, therefore, they have a *prima facie* title to the same. How the leasehold interest came to be owned and possessed by the plaintiffs being derived from Ramdayal

Mazumdar or his successors-in-interest has been elaborately described by the Subordinate Judge in his order under appeal, and it need not be repeated here. The proprietor of mauza Katras granted another lease of some coal lands in the same mauza to one Mr. Bennet and another in the year 1917 and the said Mr. Bennet, it is said, dug the two disputed inclines and air shafts in the northern portion of the coal land of the plaintiffs during the time of the plaintiffs' predecessor-in-interest, namely, Lalit Mohan Bose and raised some coal without his knowledge and consent. Lalit Mohan having protested against the wrongful acts of Mr. Bennet, the latter quitted the inclines and the shafts and the land encroached upon. According to the plaintiffs, since then these inclines had never been worked for the purpose of raising coal until December 1944, when the defendants for the first time started working out the inclines for the purpose.

The defendants, it can be shortly stated, without narrating the history of their acquisition of the rights in question, are the successors-in-interest of Mr. Bennet and another. The plaintiffs, therefore, urged that the defendants are mere trespassers having no right to the inclines, air shafts and also the lands below them which are in dispute in this case as they form a part and parcel of their leasehold interest having been given up in their favour as stated above. The defendants, on the other hand, contend that the said inclines and air shafts have all along been in possession of their predecessors-in-interest including Mr. Bennet and his partner, the land in dispute being within their lease, that neither the plaintiffs nor their predecessor-in-interest have ever been in possession of the same, and that the plaintiffs, taking advantage of the fact that defendant 1 is a *pardanashin* lady and is an absentee, wrongfully encroached upon the said land and started working out certain shafts for extracting coal beneath the shafts which the defendants had started working out since December 1944, and that they anticipating the defendants' contemplated suit against them for their act of trespass, filed the present suit which is not a *bona fide* one. The question at issue, therefore, is whether the lands in dispute are within the boundaries of the respective leases of the parties on which they base their title.

It is admitted on both hands that prior to December 1944 both the parties or their predecessors-in-interest had stopped working the coal mines respectively belonging to them

on account of dullness of coal market. The plaintiffs have produced no document to show that Mr. Bennet had vacated the inclines in dispute on protest of Lalit Mohan Bose as alleged by them in their plaint. The plaintiffs' suit is in substance a suit in ejectment. The plaintiffs' on bringing this suit moved the learned Court below to pass an order of interlocutory injunction against the defendants restraining them from working out the disputed mines.

The main allegations on which the plaintiffs based the prayer for the temporary interference are: (1) that the defendants, according to the plaintiffs' information, had been robbing and reducing the pillars in the mine and have been cutting and removing coal in a reckless and unworkmanlike manner giving rise to every probability and apprehension of a serious subsidence and collapse which may ultimately lead to destruction of the property in dispute; (2) that the defendants have not got sufficient properties under the jurisdiction of this Court and there is no chance of damages, if any, being recovered from them; (3) there is a great difficulty in assessing damages as the quantity of coal extracted cannot be easily ascertained; in short the plaintiffs will suffer irreparable injury in the event of injunction being withheld; and (4) that the defendants being guilty of wantonly wrongful act of trespass into the properties of the plaintiffs, and their possession not being based upon any bona fide claim of title to the same, they should, at all events, be restrained from further continuance of their wrongful act.

The defendants, on the other hand, contend, (1) that the plaintiffs have not shown to have a *prima facie* title to the disputed property; (2) that the defendants and their predecessors-in-interest have been, at all material times, since the creation of the lease and the inclines and air shafts, in possession of the properties in dispute to the entire exclusion of the plaintiffs; (3) that the defendants are working the mines, and removing coal, in moderate quantity, according to the most scientific and approved methods of mining, with due regard to the safety and future working of the mines, and in strict accord with the provisions of the Indian Mines Act, and the rules and regulations made thereunder; (4) that they have invested large sums of money for working out the mines, and, therefore, in the event of their being restrained from working them out, they will be subjected to irreparable loss; (5) that they have sufficient means worth about

5 lakhs consisting of house properties and various kinds of other properties including collieries, and, damages, if any, are very easily recoverable from them; (6) that this is not a fit case in which an interlocutory order of injunction should be granted inasmuch as the plaintiffs' in the event of their establishing their legal title, can be sufficiently compensated by damages, and (7) that the balance of convenience is in their favour. The learned Subordinate Judge rejected the plaintiffs' prayer for injunction upholding the contentions of the defendants. Hence, this appeal by the plaintiffs. The learned Subordinate Judge went wrong while dealing with the point of *prima facie* title, in his following observation :

"Now, from these facts I am not prepared at this stage to accept the contention that the plaintiffs have got a *prima facie* title. Simply the filing of a case with certain allegations is no ground to accept the point of *prima facie* title. The plaintiff in such a case must make out a plain case (*vide* Halsbury's Laws of England, Volume 18, 110, 1935 Edition). *In my view there is no such case here at present as the plaintiffs' right will have to be established and decided before it can be said that he has got a prima facie title.*"

Mr. B. C. De who appears for the appellants contends—with which contention I entirely agree—that the learned Subordinate Judge is wrong in holding that in order to make out a *prima facie* case necessary for granting an interlocutory injunction, the plaintiff should establish his title. But it is enough, for the plaintiff for granting an interlocutory injunction if he can show that he has a fair question to raise as to the existence of the right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed of. In interfering by an interlocutory injunction, the Court, in general, does not profess to anticipate the determination of the right but merely gives it, if, in its opinion, there is a substantial question to be tried, and if, till the question is ripe for trial, a case has been made out for the preservation of the property, in the meantime, in *status quo*. He is not required to make out a clear legal title but has to satisfy the Court that he has a fair question to raise as to the existence of legal right, and that there are substantial grounds for doubting the existence of the alleged legal right the exercise of which he seeks to prevent. It is no less important to observe that the Court must also, before disturbing any man's legal right, stripping him off any of the rights with which law has clothed him, be satisfied

that the probability is in favour of his case ultimately failing in the final issue of the suit. It has to be, at the same time, borne in mind that a mere existence of a doubt as to the plaintiff's right to the property does not itself constitute a sufficient ground for refusing an injunction though it is always a circumstance which calls for the attention of the Court. In this view of the matter, it cannot be said that the plaintiff has not been able to show that he has raised a fair and substantial question which has to be tried. The plaintiff, for this purpose, has relied upon the judgment of the Title Suit No. 32 of 1896 which was tried analogously with Title Suit No. 48 of 1896. It may be observed at the outset that the judgments and decrees of those suits are not binding between the parties in the sense of their being *res judicata*, because in that case the plaintiff's predecessor-in-interest was claiming certain specific lands as appertaining to his leasehold interest with which the present defendants or their predecessors-in-interest neither had nor have anything to do. Secondly, the defendants derive their interest from the lease of Mr. Bennet and another which was not then in existence, and, therefore, there could not have been any dispute relating to the boundaries between Ramdayal's lease and Bennet's lease, but at any rate that judgment is a piece of evidence for the plaintiff. It is noticeable that the proprietor of Katras, who was also a pro forma defendant in Ramdayal's suit, supported his case as to his lease including Charridhar Kanali. The Court, however, in adjudicating Ramdayal's title to the lands then in dispute came to the conclusion:

"It may be that the boundaries given in Ramdayal's patta cover the whole of the south-western portion of Mouza Katras. But when the lands settled with Bhudhar were admittedly taken by the Raja (the proprietor of Katras) from Ramdayal and that for a consideration, they must be held to have been excluded from his patta. The boundaries taken by themselves would cover Charridhar Kanali as well. For Chokabad is mentioned in describing the northern boundary of the land settled with Ramdayal and a large portion of Charridhar Kanali would be comprised in his tenure."

With regard to the southern boundary of Bhudhar's lease, the Subordinate Judge in that case finds:

"It is clear that the Dangas appertaining to Chokabad and Charridhar Kanali were settled by the Rajah with Bhudhar. The question then is whether the Danga on the south of Charridhar Kanali appertains to it. From the evidence and probabilities of the case I have no hesitation in holding that it does. Of course there has been much hard swearing on the point but the truth has oozed out in spite of the efforts of the Raja and

Ramdayal to suppress it. The Raja admits that the boundaries of the Katras lands as given in the patta are correct. The following is the southern boundary of the Katras land as given in the patta, namely, the farthest extremity of Jama Jore and Charridhar Kanali and hillocks. A reference to the Commissioner's map will at once show that this boundary covers the entire *baid* and *Danga* in dispute painted yellow on the south of Charridhar Kanali. The meaning of the sentence is that the southern boundary extends to the farthest limits of Jama Jore and Charridhar Kanali up to the hillocks. Surely the hillocks would not have been mentioned as forming the boundary if it had been intended to exclude the *baid* and *Danga* aforesaid from the defendants' (Bhudhar's) tenure. The hillocks are stumbling blocks in the way of the Raja's and Ramdayal's contention."

In the result, therefore, the hillocks to the south of Charridhar Kanali and Chokabad were held to be the boundary between the leases of Bhudhar and Ramdayal. It is clear, therefore, that the hillocks are the northernmost boundary of the lease in favour of the plaintiffs' predecessor-in-interest. The disputed lands on which the defendants are working out the colliery in the inclines dug by Mr. Bennet lie, according to the plaintiffs, to the south of the hillocks and the defendants are not in a position to contradict this. Further, according to the finding in that case, though the northern boundary of Ramdayal's lease taken by itself would cover Charridhar Kanali as well, Chokabad being described in the said lease as the northern boundary of the land, the disputed lands were adjudicated in favour of Bhudhar on the ground that by consent of Ramdayal and the proprietor, they were taken out from Ramdayal's lease to be included in Bhudhar's lease. But this consideration will not apply to the lease of Mr. Bennet which comes into existence in the year 1917, and it is no part of the defendants' case that any other lands included within the boundaries of Ramdayal's lease were taken out with his consent or that of his successor-in-interest in order to be given to Mr. Bennet. Mr. De has shown to us, in the mining survey map, that the lands lie within the boundaries as declared in the above-mentioned suit of 1896. We do not propose to come to any definite finding so as to anticipate the determination of the dispute between the parties which has to be tried out by the Subordinate Judge in regular course. There is, however, a lacuna in the argument of Mr. De and it is this that he does not produce Bennet's lease so as to enable us to compare the northern and southern boundaries of the respective leases. In its absence it is difficult to arrive at any certain conclusion, but we are satisfied that it cannot be said that the plaintiffs have not

substantiated that their claim is a bona fide one and their suit raises a fair and substantial question to go to the trial. We are satisfied, therefore, that the plaintiffs have shown a *prime facie* case, but in our view that is not enough for them to secure the interlocutory order of injunction. At the same time it can be very safely laid down in this case, however, that the plaintiffs have not been able to satisfy that there are substantial grounds for doubting the existence of the alleged legal right in the defendants, the exercise of which they seek to prevent. This, by itself, is a stumbling block in the plaintiffs' way.

There are various other considerations which, in my view, fully disentitle the plaintiffs from getting the relief of interlocutory injunction. They can be summarised as follows: (1) that the plaintiffs must show that in the event of withholding the relief of temporary injunction, they will suffer an irreparable injury; (2) that this is a case in which in the event of their success in the suit in establishing their alleged legal right the encroachment whereof is complained against, they will not have the proper remedy in being awarded adequate damages; (3) that the plaintiffs must make out that in taking into consideration the comparative mischief or inconveniences to the parties, the balance of convenience is in their favour, or, in other words, that their inconvenience in the event of withholding the relief of temporary injunction will in all events exceed that of the defendant in case he is restrained. This has to be borne in mind that this last condition can, under circumstances, be so adjusted as not to deprive either party of the benefits he is entitled to in the event it turns out that the party in whose favour the order is made shall be in the wrong, by imposition of terms on one party or the other as condition of either granting or withholding the injunction. Lastly, the plaintiffs have to show a clear necessity for affording immediate protection to their alleged right or interest which would otherwise be seriously injured or impaired. I will now proceed to consider seriatim whether in view of the particular facts and circumstances of this case, and in applying the aforesaid principles governing the granting or refusing an interlocutory injunction to them the plaintiffs are entitled to succeed.

Point No. 1. — Irreparable injury does not mean injury that is not physically capable of being remedied but it is such an injury which could not be adequately remedied by

damages. Inadequacy of remedy by damages means that the damages obtainable by law are not such compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood. In the present case the property in dispute is a coal mine, and its utility consists in extracting coal in scientific and workmanlike manner, without any permanent detriment to it, and to put them in the best available market, for the purpose of gain. The defendants have said that they are working the mine in workmanlike and scientific manner under the rules and regulation of the Mining Act, and under the supervision of the inspectors functioning thereunder. The plaintiffs did not seriously challenge it. It cannot be gainsaid that the present is the best market for fetching good prices for coal. It may be remembered in this connection that previously both parties had stopped extracting coal on account of dullness of market. Now, in the event of the plaintiffs establishing their legal right, they may be sufficiently compensated for being kept out of possession of the mines in recovering the price of coal with interest from the defendants in the shape of damages. Nothing has been shown to us how award of damages is not full and complete remedy of the plaintiffs' grievance. The allegation advanced to show that there is no likelihood of damages being recovered from the defendants is that they have no properties within the jurisdiction of this Court, while the defendants have sworn to say that they have buildings and other house properties in Dhanbad besides collieries and coal mines within this province worth about five lakhs. This has not been controverted to the satisfaction of the Subordinate Judge. Nor has it been suggested that there will be multiplicity of suits for recovery of such damages, because in this suit the plaintiffs can get that relief along with declaration of their title and recovery of possession.

The plaintiffs further said that there will be difficulty in ascertainment of the quantity of coal extracted by the defendants. In this connection, it is to be borne in mind that under the present law the defendants have to submit monthly returns of their output of coal from the mines to the mining department of the Government, and the learned Subordinate Judge has laid it down, as a condition for withholding the injunction, that the defendants will submit six monthly returns to the Court of the coal extracted by them which order we propose to modify

by saying that instead of six monthly returns, the defendants will have to submit monthly returns of the coal taken out by them from the disputed mine. That being done, any objection on the score of ascertainability or otherwise of the quantum of coal will vanish. Nor have the plaintiffs shown that coal is being worked out in unscientific manner. In my view, therefore, the plaintiffs have not succeeded in convincing the Court that this is a case in which injunction being withheld, they will suffer irreparable injury.

Point No. 2 — Mr. De contends that the remedy of damages is no ground for refusing an injunction and in support of his contention, he has cited the authority of (1895) 1 Ch. D. 287¹ at p. 322. The passage referred to in the judgment of A. L. Smith L. J. in support of his contention reads :

"Many Judges have stated, and I emphatically agree with them that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's right, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction."

This case is very clearly distinguishable on the following grounds. It was a case in which the defendant was committing a perpetual nuisance in carrying certain trade near the premises of the plaintiffs, thereby causing him inconvenience which can best be described in the words of that learned Judge himself, viz.,

"Kekewich J. has found, and these findings are unappealed against, that the defendants were at the date of action brought, creating a continuing nuisance by means of vibration, noise and steam which were produced by the working of their plant and machinery, whereby not only annoyance, inconvenience and personal discomfort were occasioned to the plaintiff, his wife and daughter in the occupancy of their house, but the two latter had been, by the nuisance, made actually ill. There was also evidence that the defendants, by the erection of their works, had let down the buildings of the plaintiff, which consequently cracked and that the continuous vibration which subsequently arose from the user of their plant and machinery was constantly increasing and aggravating these cracks." In relation to this state of things the learned Lord Justice states:

"It is here that I cannot agree with the learned Judge. Because the plaintiff does not suffer a money loss, and is only driven out of his upper floors, and has only to make arrangements for

sleeping elsewhere he, according to the Judge, is not entitled to stop the continuance of the nuisance, but damages are a very fair compensation."

The same learned Judge in the same page has laid down what he calls a good working rule, namely that

"(1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction: then damages in substitution for an injunction may be given."

It is impossible to lay down any rule as to what, under different circumstances of each case, constitutes small injury or one that can be remedied in money, or what is a small money payment or an adequate compensation, or what would be oppressive to the defendant. As I have shown above, this is a fit case in which not only the plaintiffs' injury, if any, can be adequately compensated by payment, but that it is pre-eminently a case in which it would be oppressive to the defendant to grant an injunction. In view of the financial condition of the parties and the length of time for which the subject-matter of the suit may remain unadjudicated in the trial Court, it cannot be said that the money payment that is to adequately compensate the plaintiffs' alleged injury will be so heavy as to be beyond the means of the defendants to pay. As I have said above it has not been established by the plaintiffs that the defendants are clearly in the wrong and have no bona fide and fair legal right in support of their action. In this connexion it may be observed that the defendants and their predecessors-in-interest being in possession of the disputed property, have invested large sums of money for digging inclines, making air shaft and fitting machines and machinery for extracting coal in a scientific and workmanlike manner. Truly, it would be oppressive to restrain the defendants from working out the mine. It can also be seen very clearly that to stop the working at the time when the market for coal is very brisk will not do any good to the plaintiffs in the event of their successfully establishing their legal right.

Mr. De further relied upon the case in (1911) 1 K. B. 455.² That case also is clearly distinguishable on the simple ground that it was a case of complete extermination of the property in dispute. In that case the subject-matter was one hundred shares that

1. (95) 1 Ch. D. 287 : 64 L. J. Ch. 216 : 72 L. T. 34 : 43 W. R. 238, *Shelfer v. City of London Electric Lighting Company*.

2. (1911) 1 K. B. 455 : 80 L. J. K. B. 155 : 104 L. T. 446, *Jones v. Pataya Rubber and Produce Co. Ltd.*

had been allotted to the plaintiff of that case, on his application for it on part payment of the share money. The plaintiff disputed that he had been led into this purchase by certain misrepresentations, and that he was, therefore, entitled to withdraw from the transaction on refund of the money paid by him, while the defendants gave him an ultimatum that unless he complied with the call for the balance of the share money by a certain date, he would forfeit the shares. The plaintiff, in instituting the suit for adjudication of his right to cancel the purchase and get back the money paid towards the price, wanted an injunction to restrain the defendant company from forfeiting the shares. In such a case it was held that the property concerned should not be allowed to be completely destroyed, and considering the relative convenience of the parties, it was held that it was more in the interest of both parties that the forfeiture should be restrained. It was held that in case the plaintiff succeeded in his suit, well and good, and if he did not succeed, he would not have the benefit of paying the balance of the consideration and enjoying the shares. The theory of comparative inconvenience and mischief works differently in different cases according to the facts and circumstances of each particular case. In my view, therefore, that is no authority for the proposition contended for by Mr. De that in no circumstances award of adequate damages would be considered to be full and complete remedy but that interference by interlocutory injunction should be held to be the rule irrespective of the circumstances of the case.

He further relied upon the case in 41 Cal. 436.³ That case, while laying down that *prima facie* title means a fair and substantial question to be decided as to what the rights of the parties were, lays down that in deciding whether interference by interlocutory injunction may be made by the Court, the balance of convenience should be examined to see if it is desirable that *status quo* should be maintained, or the defendants should be allowed to continue to alter the character of the land. That was a case as between two cosharers in which one of them, that is the defendant, was altering the character of the land by erecting substantial buildings thereon. The difficulty in that case would be to adjust between the parties at the time of the partition. Besides, in that case the defendant's conduct was such that their

Lordships held that he was not only entitled to invite the Court to withhold injunction but that he was to be directed that the building already erected should be taken off.

The three decisions relied upon by Mr. De are not applicable to the facts of the present case, nor do they lay down any principle at variance with what I have said above in my summary of the points to be considered in determining whether the plaintiffs are entitled to the relief of interlocutory injunction against the defendants. One is a case of continuing nuisance resulting from a wantonly wrongful act of the defendant, the second was a case of complete destruction or wiping out of the subject-matter in dispute; and the third is a case of altering character of the disputed property. I shall, therefore, hold that this is a fit case in which, in the event of the plaintiffs' success, award of compensation and damages would be full and complete remedy and interference by a temporary injunction is not called for.

Point No. 3.—Let me consider in whose favour is the balance of convenience. In this connection the plaintiffs have to show that their inconvenience in the event of withholding the relief of temporary injunction will in all event exceed that of the defendants, and they have further to show that their such inconvenience will outweigh what they have to suffer, if the injunction is granted. In case injunction is granted, the result will be that the working out of the colliery will be stopped. By the time the litigation is over, the present coal market may not be there. It is more likely that market will fall as soon as war conditions disappear. In such circumstances, the plaintiffs even in the event of their success will be a great loser, because they cannot call upon the defendants to pay them damages. On the other hand, if injunction is withheld, the defendants work out the mine and derive profits, those will be of the plaintiffs in the event of their success coming to them in the shape of damages or mesne profits. As I have said above, there is no multiplicity of suit apprehended for ascertaining the damages. There will be no difficulty in ascertaining the amount of coal extracted and the market rate of coal, nor will there be any difficulty in recovering the damages ascertained from the defendants who, it has been found above, are men of substance, nor is it said either they have done or are bent upon doing anything to defeat or obstruct execution of the decree which may eventually be passed against

3. (14) 1 A.I.R. 1914 Cal. 362 : 41 Cal. 436 : 21 I. C. 861, Israil v. Shamsheer Rahman.

them. In my view, therefore, the balance of convenience is in favour of withholding the relief of interlocutory injunction. For the purpose of removing any difficulty for ascertaining damages, I am imposing certain terms on the defendants in addition to what has been laid down by the learned lower Court.

Lastly, as I have observed above, the plaintiffs have to show a clear necessity for affording immediate protection to their alleged right or interest which would otherwise be seriously injured or impaired. It has already been held by me that this is neither a case of destruction nor waste nor alienation of the subject-matter in dispute, nor is it a case in which the defendants are guilty of making any efforts to obstruct or delay the execution of any decree that might eventually be passed. Therefore, on this consideration too, there is no clear necessity of any protection by temporary injunction sought for by the plaintiffs. In my view, therefore, the plaintiffs' application for temporary injunction has been rightly dismissed.

In order to further obviate the apprehended difficulties in ascertaining the amount of coal extrated from time to time, I should direct that the defendants must produce in Court monthly returns of coal derived from the disputed mine, and that they will keep regular accounts of their business so as to make it easy to ascertain the profits derived by them in the event of the plaintiffs succeeding in establishing the legal right which they have claimed in the suit. These should be considered as conditions for withholding the relief of temporary injunction. I entirely agree with the learned Subordinate Judge that in case the plaintiffs satisfy him about the falsity of the defendants' assertion that they have properties worth Rs. 5 lacs in this province, the defendants will be called upon to furnish security for due discharge and satisfaction of any decree that might be passed against them in the suit. Holding, as I have done, that this is not a fit case in which the Court will be justified in exercising the jurisdiction of granting relief of interference by interlocutory injunction, I dismiss this appeal subject to the modification mentioned above. In view of the circumstances of this case, I order that each party will bear its own costs of this appeal. The Subordinate Judge is asked to expedite the hearing of this case.

Das J. — I agree.

G.N.

Appeal dismissed.

[*Case No. 76.*]

A. I. R. (33) 1946 Patna 184

BEEVOR J.

Kishun Prasad — Petitioner

v.

Hardwar Singh and others —

Opposite Party.

Civil Revn. No. 677 of 1944, Decided on 18th September 1945, from order of Munsif, Monghyr, D/- 19th June 1944.

Civil P. C. (1908), O. 9, R. 9 and S. 151—Suit partly dismissed for failure to pay adjournment costs — Application for restoration is competent—Remedy for dismissal of such application is by appeal.

In a suit for rent the defendant admitted only a part of the claim and the plaintiff was granted time to produce certain documentary evidence subject to payment of adjournment costs as condition precedent. On the date of hearing plaintiff did not pay the costs and the rest of his claim was dismissed. The plaintiff then applied under O. 9, R. 9 and S. 151 for restoration of the suit but the application was rejected as being incompetent. Plaintiff applied in revision against this order :

Held that the application under O. 9, R. 9 was maintainable. But the plaintiff's remedy against the rejection of the application was by way of appeal and not by a revision application.

[P 185 C 1]

Held further that S. 151 did not apply to the facts of the case: ('25) 12 A. I. R. 1525 Pat. 435, *Disting.*

[P 185 C 1]

C. P. C. —

('44) Chitaley, O. 9, R. 9, N. 1.

Ramakant Varma — for Petitioner.

K. Dayal and Mohammad Ayub —

for Opposite Party.

Order. — The petitioner brought a suit for rent. The substantial question at issue between him and the defendant was whether the total rental was Rs. 135 as alleged by him or Rs. 35-8-8 as alleged by the defendant. On 23rd September 1943 the plaintiff was granted time to produce certain documentary evidence on payment of Rs. 5 as adjournment costs. The payment was made a condition precedent to the hearing of the suit. There were several adjournments, and finally the suit was called for hearing on 25th February 1944 when the order sheet shows that the plaintiff did not pay the costs, and, therefore the suit was decreed according to the rate admitted by the defendant. On 28th February 1944 the petitioner filed an application which headed as under O. 9, R. 9 and S. 151, Civil P. C., for restoration of the suit. This application was rejected on 19th June 1944 on the ground that it was not maintainable, and that the plaintiff's remedy was to file an appeal against the decree dated 25th February 1944. The petitioner has, therefore, moved this Court.

Now, I cannot agree with the view which has been expressed by the learned Munsif for dismissing the application by his order dated 19th June 1944, but it seems to me that this petition should fail on another ground. I am of the opinion that the application dated 28th February 1944 did lie under O. 9, R. 9, and, therefore, when it was rejected on 19th June 1944 the petitioner's remedy was by an appeal to the District Judge. It is urged, however, that S. 151 would apply because it was uncertain which provision of law would apply, and in this connection I was referred to the decision in 4 Pat. 180.¹ That was a case in which the plaintiff handed over deficit court-fees to his pleader. Had the petitioner handed over the amount payable as adjournment costs to his pleader in the present instance, that case might have been applicable, but this is not the petitioner's own case. His own version, according to his petition of 28th February 1944 was that his karpardaz had gone away to the Imperial Bank some 100 yards off and when he returned, the suit had been dismissed. Unfortunately for the petitioner at the critical time when the matter arose, neither he nor his karpardaz were ready to pay the money. The fact that they had been ready on previous occasions is, to my mind, quite irrelevant. There is an affidavit on the record to show that they were ready to pay but there is no affidavit that the money was ever tendered either to the opposite party or to the Court, and, in these circumstances, I see no ground on the merits for re-opening the question which was decided by the order of 25th February 1944. The petition is, therefore, dismissed with costs. Hearing fee, one gold mohur.

G.B./D.H.

Petition dismissed.

1. ('25) 12 A.I.R. 1925 Pat. 435 : 4 Pat. 180 : 91 I. C. 213, Adit Prasad Singh v. Rambarakh Ahir.

[Case No. 77.]

A. I. R. (33) 1946 Patna 185

MEREDITH AND RAY JJ.

*Badri Khatik — Defendant**— Appellant*

v.

Narain Singh and others—Plaintiffs
— Respondents.

Appeal No. 171 of 1944, Decided on 30th November 1945, from appellate decree of Addl. Sub-Judge, Gaya, D/ 28th January 1944.

(a) Limitation Act (1908), Art. 144 — Burden of proof — Plaintiff establishing relationship of landlord and tenant — Defendant must prove ouster.

1946 P/24 & 25

Where in a suit for ejectment the Court finds that the defendant's occupation is not independent of the plaintiff, that is to say, not on his own independent title but as a tenant under the plaintiff it is necessary for the defendant, in order to succeed, to establish ouster, that is, assertion of hostile title as against the plaintiff and claiming title on his own account and after such assertion to the knowledge of the plaintiff, his remaining in possession for the statutory period of 12 years or more. [P 187 C 1]

(b) Limitation Act (1908), Arts. 142 and 144— It is substance and actual facts found by Court that decides whether suit is governed by Art. 142 or Art. 144—Suit held, was governed by Art. 144. (Per *Ray J.*).

In deciding as to whether a particular case attracts the provisions of Art. 142 or Art. 144, the Courts have to interpret the Articles as they stand. It is not the form of allegations of the plaintiff which determines the nature of the suit, but it is the substance and the actual facts found by the Court which decides whether the suit is one which comes within the purview of Art. 142 or Art. 144. So far as Art. 142 is concerned, it is not necessary that the suit should be one in which the plaintiff should allege that he has been in possession and dispossessed : ('32) 19 A.I.R. 1932 Oudh 46, *Ref.* [P 187 C 2; P 188 C 1]

Limitation Act—

('42) Chitaley, Arts. 142, 144, N. 2 Pts. 13, 14, N. 87, Pt. 22.

('38) Rustomji, page 1317 Pts. 3, 4.

Sarju Prasad and S. P. Singh—for Appellant.
Raj Kishore Prasad and Lakshmi Narain Sinha — for Respondents.

Ray J. — This is a defendant's second appeal against the judgment of the lower appellate Court, decreeing the plaintiffs' suit in ejectment against the defendant-appellant. The subject-matter of dispute is a house within the municipal limits of the town of Gaya, and is subject to municipal assessment. The plaintiff started his suit on the allegation that the disputed house, had been acquired by his elder brother, Chhedi Singh, by purchase, and that at the time, the defendant's father was occupying the house as a tenant on a monthly rent of eight annas. He, however, vacated the house in the year 1339 and thereafter he died. Subsequent to that, the present defendant was introduced into the same house as a tenant in the year 1340 on a monthly rent of Re. 1. The defendant paid the settled rent for about a year or two, and then discontinued doing so, on which the plaintiff served him with a notice to quit on 3rd May 1937. In reply thereto the defendant set up a title in himself, and, therefore, the plaintiffs brought the suit to eject the defendant, claimed arrears of rent, and damages since the termination of the tenancy, on service of notice to quit. The defendant's story was that the house in dispute had been built by the defendant's uncle, Shama Khatik, and

the lands, the house site, had been gifted to him by Chulhan Sahu who admittedly was the owner thereof. He further pleaded that the plaintiffs' suit was barred by limitation, neither they nor their predecessor-in-title having ever been in possession within twelve years of the suit. They also set up a title by adverse possession.

The Munsif, who tried the suit in the first instance, came to a finding that the plaintiffs' title to the disputed house including the site thereof was well proved. He had framed, on the pleadings before him, an issue as to limitation, which was in these terms: "Is the suit barred by limitation?" Before him, this issue of limitation was not pressed. He, therefore, granted the plaintiffs a decree for ejecting the defendant. He, however, found that the allegation of tenancy in year 1340 at a monthly rent of Re. 1 had not been established. Therefore, the plaintiffs were not entitled to claim any amount as arrears of rent, but he granted the plaintiffs damages, in lieu thereof, to the extent of Rs. 50. This judgment of the learned Munsif was appealed from, and the learned lower appellate Court agreed with him on the question of plaintiffs' title, but it was represented to the lower appellate Court that the issue of limitation had not in fact been abandoned before the learned Munsif. The learned lower appellate Court, at that stage, had come to a clear finding that the plaintiffs had title to the property, and that the defendant's predecessor-in-interest was the tenant in occupation at some anterior date, but that all the same, he felt that the question of limitation must be decided afresh by the trial Court. He, therefore, remanded the case to the Munsif to come to a decision on this issue and dispose of the suit in accordance with law. The Munsif who tried the suit, after remand, recorded a finding that admittedly the defendant and his predecessor-in-interest having been in occupation for more than 30 or 35 years, and the allegation of tenancy created in the year 1340 not having been proved, and any previous tenancy not having been pleaded, the defendant had acquired a title by adverse possession, and the plaintiffs not having proved a subsisting title, or not having proved that they were in possession within 12 years of the suit, their suit must fail as barred by limitation. In course of his finding he had said that in the municipal survey, which had taken place in 1913, the plaintiffs were recorded as owners, in respect of the holding and the defendant as an occupier,

and that there was a dispute as against this entry raised by the plaintiffs in 1916 before the survey officer who decided that the plaintiffs had nothing to lose by such a record as it would not confer on the defendant any permanent right of occupancy. The learned Munsif remarked, however, that this record was of no help to the plaintiffs in establishing either that there was a tenancy prior to the year 1340 or that the plaintiffs were in possession within 12 years of the suit.

The plaintiffs then took the matter in appeal, and the lower appellate Court by its judgment, which is under appeal, came to a very clear finding that there was a tenancy in favour of the defendant's predecessor-in-interest. He, therefore, found that the plaintiffs were in constructive possession through their tenant, namely, the defendant, within 12 years of the suit. He finds in substance that the defendant being a tenant, at some time or other, it is for him to establish acquisition of title by adverse possession. Therefore, on these grounds he reversed the decision of the learned Munsif, and gave the plaintiffs a decree. Mr. Sarju Prasad, who appears for the appellant, argues very strenuously, that this is a case in which the plaintiffs must prove subsisting title within 12 years of the institution of the suit. The suit is one in ejectment, to which Art. 142, Limitation Act, would apply, and in such a case it was for the plaintiffs to establish that they were in possession within 12 years of the suit. It having been admitted by the plaintiffs that the defendant or his predecessor-in-interest has been in possession of this property for about 30 or 35 years, the learned Subordinate Judge should have found that the plaintiffs' suit was barred by limitation. He urges that the lower appellate Court has nowhere found that there was a relationship of landlord and tenant as between the parties. Therefore, it was not necessary for the defendant to establish title by adverse possession, but it was necessary for the plaintiffs to establish that they were in possession within 12 years of the suit. Mere proof of plaintiffs' title will not suffice.

His contention, in my judgment, is not at all correct. He is wrong, in my view, in his submission that the learned Subordinate Judge has not come to a finding that there was ever any relationship of landlord and tenant as between the plaintiffs and the defendant. To make this clear, I wish to notice some of the passages in the judgment of the learned lower appellate Court, which

will conclusively show that he has applied his mind to this aspect of the case and has come to a distinct finding. In his judgment dealing with the point of limitation he says: "Here we find that all that the plaintiffs have failed to prove is the story of tenancy set up by the plaintiffs, (here he means the fresh tenancy of 1340), the result of which is that rightly the presiding officer of the lower Court did not allow any amount by way of rent or damages to the plaintiffs. Merely on that score we cannot presume that the defendant has been in possession of the house *quite independently of the plaintiffs*. Exhibits 9 and 10, which are municipal papers, clearly show that the physical possession of the defendant has been as a tenant of the plaintiffs in the house in dispute. Apart from this, it is clear that the plaintiffs have been paying the municipal taxes all along, while the defendant never paid municipal taxes at any time."

Then he concludes :

"I hold that the plaintiffs have had symbolical possession just as they have title to the house in question, and the physical possession of the defendant does not constitute ouster of the plaintiffs."

In my view, he thus very clearly finds that the defendant's occupation was not independent of the plaintiffs, that is to say, not on his own independent title but as a tenant under the plaintiffs. He, therefore, holds that the plaintiffs were in constructive possession, though he used the wrong word "symbolical," through the defendant. Therefore, it was necessary for the defendant, in order to succeed in the case, to establish ouster, that is, assertion of hostile title as against the plaintiffs and claiming title on his own account and after such assertion, to the knowledge of the plaintiffs, his remaining in possession for the statutory period of 12 years or more. The lower appellate Court finds that this the defendant has not been able to do. Mr. Sarju Prasad, however, finds a vulnerable point in the judgment, namely, in the rather infelicitously expressed legal proposition with which the learned Subordinate Judge starts his judgment in so far as he deals with this aspect of the case. The passage runs like this :

"The general principle of law is that possession follows title, and so unless and until it is proved that the man having actual physical possession over the house is in possession to the ouster of the plaintiff who has got title, he cannot be allowed to claim any right of keeping the house by virtue of that possession. In other words, unless and until the defendant's possession is found to be adverse to that of the plaintiffs the defendant cannot claim any right or title to retain the house".

It is clear, however, that when he propounded his proposition in these words he had in his view the facts of this particular case. It will appear from the above quotation, that he is talking of retention of

possession by the defendant, which is just the term applicable when the defendant in his right as a tenant wants to resist ejection on the part of the plaintiffs-landlords. However erroneous he may be in his expression of law, there is absolutely no hesitation in my mind that he has brought his mind to bear upon the real aspect of the case, namely, whether the plaintiffs had substantiated their allegation that the defendant or his predecessor-in-interest was a tenant in respect of the holding at however remote a time and after this was found he had to call upon and see the defendant to establish title by adverse possession to the ouster of the plaintiffs, which is just the right view that he should be deemed to have taken. Mr. Sarju Prasad, however, concedes that if it is held that the learned lower appellate Court has come to a finding that there was relationship of landlord and tenant between the parties, he cannot contend with success that the decision of the learned Subordinate Judge was wrong in law. His whole complaint was that there was no such finding, but I have shown how his contention does not pay attention to the clear finding in the Subordinate Judge's judgment. We have also had the advantage of reading the previous two judgments of the trial Court and the lower appellate Court, and we have fully satisfied ourselves that those findings, which have never been upset by the Court that remanded the case for a retrial on the limitation issue, make it very clear that at all stages and at all material times existence of relationship of landlord and tenant had been accepted to be a fact.

Mr. Rajkishore Prasad appearing for the respondents wanted to contend that even though there be no finding establishing the relationship of landlord and tenant between the plaintiff and the defendant in a suit in ejection, Article 144 would apply if the plaintiff in his plaint does not make out a case of possession and dispossession. He cited 7 Luck. 250¹ in support of this contention. As was very rightly observed by my learned brother in course of argument, we have to interpret Articles 142 and 144 as they stand in deciding as to whether a particular case attracts the provisions of this Article or that Article. So far as Article 142 is concerned, it is not stated there that the suit should be one in which the plaintiff should allege that he has been in possession and dispossessed. It is not the

1. (32) 19 A. I. R. 1932 Oudh 46 : 7 Luck 250 : 137 I. C. 678, Suraj Bali v. Mahadeo Prasad.

form of allegations of the plaintiff which will determine the nature of the suit, but it is the substance and the actual facts found by the Courts which will go to decide whether the suit is one which comes within the purview of either Art. 142 or Art. 144. So far as the scope of the present appeal is concerned, it does not require us to go any further. In the circumstances indicated above, I would uphold the judgment of the lower appellate Court, and dismiss this appeal with costs.

Meredith J. — I agree to the order proposed, but with regard to the legal point last dealt with by learned brother I would not like to express a final opinion without further argument.

V.W./D.H.

Appeal dismissed.

[Case No. 78.]

A. I. R. (33) 1946 Patna 188

AGARWALA AND CHATTERJI JJ.

Smt. Selha Dei — Petitioner

v.

*Keshab Charan Mahanty and others—
Opposite Party.*

Civil Revn. No. 1 of 1943 (Cuttack), Decided on 28th March 1945, from Judgment, in S. A. No. 206 of 1939, D/- 24th February 1943.

Civil P. C. (1908), O. 47, Rr. 1 and 6 — Sufficient reason — Binding authority not brought to Court's notice — This is no ground for review (Per *Agarwala J.*; *Chatterji J.*, *contra.*)

Per *Agarwala J.*—It is no longer open to the Courts in this country, in exercise of the powers conferred by O. 47, R. 1, to review a judgment on the ground that an authority binding upon the Court had not been brought to its notice at the hearing of the matter, the decision of which is sought to be reviewed : ('24) 11 A. I. R. 1924 Pat. 250, *Rel. on.* [P 189 C 2]

Per *Chatterji J.*, *contra.*—The excusable failure on the part of the applicant's advocate to bring to the notice of the Court at the time of the delivery of the judgment, the Privy Council decision, by which a decision on which the judgment in question is based, is overruled and the Privy Council decision is not reported until after the judgment is delivered, is a sufficient reason within the meaning of O. 47, R. 1: ('24) 11 A. I. R. 1924 Pat. 250, *Disting.* [P 189 C 2]

[Application was dismissed under O. 47, R. 6, owing to the difference of opinion between the Judges.]

C. P. C.—

('44) Chitale, O. 47, R. 1, Notes 10 and 16b, Pt. 6.

('41) Mulla, Page 1232, Note "For any other sufficient reason."

P. Misra — for Petitioner.

G. C. Das and J. C. Mullick — for Opposite Party.

Agarwala J. — This application for review of a judgment of this Bench in second Appeal No. 206 of 1939, decided on 24th February 1943 arises in the following circumstances: The plaintiff petitioner instituted a suit for a declaration that defendant 8 was not the validly adopted son of one Bhikari. A question arose whether the plaintiff, who was the half-sister of Bhikari, was entitled to maintain the suit. The plaintiff relied upon S. 2, Hindu Law of Inheritance Act of 1929, which defines what is meant by a 'sister' for the purpose of that enactment. Two decisions were cited before us, one of the Nagpur High Court and one of this Court. We followed the decision of this Court in A. I. R. 1940 Pat. 310¹ in which it had been held that the word 'sister' in S. 2 of the Act does not include a half-sister. After our judgment in the second appeal had been delivered and signed, it was brought to our notice that the decision on which we had relied had been reversed by the Privy Council in a case which had not then been reported in the official reports, but a note of which was published in an unofficial journal. As our judgment had been signed, we were unable to deal with the matter at that stage. The plaintiff then made this present application for review of our judgment, contending that the fact of the reversal by the Privy Council of the decision on which we relied prior to the date of our judgment was a sufficient cause for reviewing our judgment within the meaning of O. 47, R. 1. In 3 Lah. 127² the Privy Council held that the words 'any other sufficient reason' in O. 47, R. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previously, that is to say, the discovery of new and important matter or evidence which, after the exercise of due diligence, is not within his knowledge, or could not be produced by him at the time when the decree was passed or order made, on account of some mistake or error, apparent on the face of the record. The correct construction of the decision of the Privy Council was considered by a Division Bench of this Court in 3 Pat. 134.³ In that case a Munsif's decision was based on an authority which had

1. ('40) 27 A. I. R. 1940 Pat. 310 : 19 Pat. 382 : 189 I.C. 883, *Mt. Daulat Kuar v. Bishnudeo Singh.*

2. ('22) 9 A.I.R. 1922 P.C. 112 : 3 Lah. 127 : 49 I. A. 144 : 72 I.C. 566 (P.C.), *Chhaju Ram v. Neki.*

3. ('24) 11 A.I.R. 1924 Pat. 250 : 3 Pat. 134 : 75 I.C. 177, *Garabindi Kamarain v. Surji Narain Singh.*

in fact been modified by a subsequent decision. An application was, therefore, made for review of the decision of the Munsif and was allowed. An appeal to the Subordinate Judge was dismissed on the ground that no appeal lay, and that, in any event, the decision of the Munsif was right. A second appeal was preferred to this Court and was heard by a single Judge, who was of opinion that the production of an authority, which was not brought to the notice of the Judge of first instance, and which lays down a view of the law contrary to that taken by that Judge, was not a sufficient ground for review. The learned Judge considered that the matter was concluded by the decision of the Privy Council in 3 Lah. 127.² From the decision of the single Judge there was an appeal under the Letters Patent which was heard by the then Chief Justice Sir Dawson-Miller and Mullick J. After referring to the conflict of opinion in the Courts of this country on the question whether the production of a binding authority which was not placed before the Court of first instance amounts to the discovery of new and important matter or evidence, the learned Chief Justice said :

"It is not necessary to consider them in detail as the whole question has, in my opinion, been finally settled by the decision of the Judicial Committee of the Privy Council in 1922 in 3 Lah. 127.² In that case their Lordships examined the case-law on the subject in India, which they found to be conflicting, and they held that the first two grounds upon which a review is permissible under O. 47, R. 1, namely, the discovery of new and important matter or evidence which could not after due diligence have been produced at the trial or some mistake or error, apparent on the face of the record did not apply to a case where the ground of review is that the judgment has proceeded upon an incorrect exposition of the law. They further held that the third ground, namely, any other sufficient reason must be a reason sufficient on grounds analogous to those previously specified. In the present case the review was granted upon the ground that the case-law relied upon by the Munsif had been modified by a subsequent decision, which, in my opinion, amounts to the same thing as a wrong exposition of the law. In view of the recent decision of their Lordships of the Privy Council it is no longer open to the appellants to argue that the ground of review was an error on the face of the record. In fact the ground upon which the application for review was based was that the petitioners were not aware of the Full Bench ruling of this Court and could not place it before the Munsif at the first trial. Even assuming that this were a legitimate ground of review, which the Privy Council has decided is not so, it could only be justified on the ground of the discovery of new matter or evidence and an order granting a review on such grounds is clearly appealable under O. 47, R. 7, coupled with R. 4 of the same order."

To my mind, it is clear from the deci-

sion of this Letters Patent appeal that the view taken of the Privy Council decision in 3 Lah. 127.² is that it is no longer open to the Courts in this country, in exercise of the powers conferred by O. 47, R. 1, to review a judgment on the ground that an authority binding upon the Court had not been brought to its notice at the hearing of the matter, the decision of which is sought to be reviewed. I would, therefore, dismiss this application for review without costs.

Chatterji J. — I regret I cannot agree with my learned brother. In my opinion there is nothing in the Privy Council decision in 3 Lah. 127.² to warrant the view that the ground on which review of our judgment is asked for does not come within O. 47, R. 1, Civil P. C. The alleged ground for review is that the decision of this Court in A. I. R. 1940 Pat. 310¹ on which our judgment was based was overruled by the Privy Council by a decision which had already been given, but not yet reported, except partly in (1943) 1 M. L. J. 180⁴ which had just come out and came to the notice of the learned advocate for the applicant after our judgment was signed. This Privy Council decision was subsequently reported in 69 I. A. 145.⁴ In 3 Lah. 127.² their Lordships held that review is not permissible merely because the previous decision had "proceeded upon an incorrect exposition of the law." There a Division Bench of the Chief Court of the Punjab had reviewed a judgment of another Division Bench, "treating the view of the law taken by the previous Division Bench as matter that was open to them as if on an appeal." With reference to the words "any other sufficient reason" in O. 47, R. 1, their Lordships pointed out that the expression 'sufficient' must be read "as meaning sufficiency of a kind analogous to the two already specified, that is to say, to excusable failure to bring to the notice of the Court new and important matters, or error on the face of the record." In my opinion, the excusable failure on the part of the applicant's advocate to bring to our notice at the time of the delivery of our judgment the Privy Council decision, by which the decision of this Court in A. I. R. 1940 Pat. 310¹ on which we based our judgment was overruled, was a sufficient reason within the meaning of O. 47, R. 1, as explained in 3 Lah. 127.² We disposed of the appeal on the sole ground that it was con-

4. (1943) 30 A. I. R. 1943 P. C. 10: I. L. R. (1943) Kar. P. C. 12: 69 I. A. 145: 206 I. C. 396: (1943) 1 M. L. J. 180 (P.C.), *Mt. Sahodra v. Ram Babu*.

cluded by the decision of this Court in A.I.R. 1940 Pat. 310.¹ That decision having been already overruled by the Privy Council whose decision was not reported until after our judgment was delivered, I consider that there is sufficient ground for reviewing our judgment.

The decision of this Court in 3 Pat. 134³ is distinguishable on its own facts. In that case the trial Court granted a review of its judgment on the ground that the authority on which it was based was modified by a subsequent Full Bench decision. This Full Bench decision was not only pronounced but also reported in the authorised law reports some months before the trial Court gave the judgment of which review was sought. The application for review was based on the ground that the applicant's lawyer was not aware of the Full Bench decision and could not, therefore, place it before the Court at the first trial. Against this decree which was passed by the trial Court on review an appeal was preferred to the lower appellate Court, but the appeal was dismissed. On second appeal to this Court, which was heard by a single Judge, the decree passed by the trial Court on review was set aside and the decree originally passed by it was restored. The case then came up on Letters Patent appeal before Dawson-Miller C. J. and Mullick J. The main question for consideration before their Lordships was whether the order granting the application for review was in contravention of the provision of O. 47, R. 4 (2) (b) so that it could be objected to in appeal under the provisions of O. 47, R. 7. It was contended on behalf of the appellant that R. 4 (2) (b) did not apply as the ground of the application for review was a mistake or error apparent on the face of the record and not the discovery of new and important matter on evidence. Dawson-Miller C. J. proceeded to deal with this contention in these words:

"It is necessary to consider, therefore, whether where the judgment sought to be reviewed is based upon a wrong application of the law this constitutes a mistake or error apparent on the face of the record."

Then after referring to the Privy Council decision in 3 Lah. 127,² his Lordship stated:

"In that case their Lordships examined the case-law on the subject in India which they found to be conflicting and they held that the first two grounds upon which a review is permissible under O. 47, R. 1, namely, the discovery of new and important matter or evidence which could not after due diligence have been produced at the trial or some mistake or error apparent on the face of the record did not apply to a case where the ground of review is that the judgment has proceeded upon an incorrect

exposition of the law. They further held that the third ground, namely, any other sufficient reason, must be a reason sufficient on grounds analogous to those previously specified. In the present case the review was granted upon the ground that the case-law relied upon by the Munsif had been modified by a subsequent decision, which, in my opinion, amounts to the same thing as a wrong exposition of the law. In view of the recent decision of their Lordships of the Privy Council it is no longer open to the appellants to argue that the ground of review was an error on the face of the record."

It is thus clear that the precise question now before us did not at all arise for consideration in that case. It seems to me that if in the present case, the alleged ground for review cannot be considered to be 'sufficient reason' as explained by their Lordships of the Privy Council, it is difficult to imagine what useful purpose the words 'any other sufficient reason' are intended to serve. Considering the circumstances of the case, I am of opinion that it is pre-eminently a case for review. But, as my learned brother is of a different opinion, the application will have to be rejected in view of the provisions of O. 47, R. 6, Civil P. C.

V.R./D.H. *Application dismissed.*

[Case No. 79.]

A. I. R. (33) 1946 Patna 190

BEEVOR J.

Ramasan Rai — Petitioner
v.

Raghunath Sahu and another —
Opposite Party.

Civil Revn. No. 561 of 1944, Decided on 18th September 1945, against order of Sub-Judge, Arrah, D/- 14th April 1944.

Civil P. C. (1908), S. 152 — Applicability — Question of contentious nature—Section cannot be invoked—Usufructuary mortgage right whether sold not determined—Sale certificate cannot be amended by adding reference to mortgage-bond.

When questions involved are of contentious nature, S. 152 cannot be invoked to justify an amendment: ('42) 29 A.I.R. 1942 Pat. 328, *Foll.* [P 191 C 1]

Where the executing Court ordered the sale certificate to be amended by adding a reference to a certain usufructuary mortgage:

Held that the sale of the usufructuary mortgage right depended on the answer to the question whether the right covered by the mortgage-bond was put up for sale and sold, and in such a case in the absence of any authoritative determination of the rights of the parties, the provisions of S. 152 could not be invoked. [P 191 C 1]

C. P. C. —

('44) Chitale, S. 152, N. 3, Pt. 16.

('41) Mulla, Page 481, Note "Amendment of decrees and orders."

Harinandan Singh — for Petitioner.

N. K. Prasad II — for Opposite Party.

Order. — This is an application in revision against an order amending a sale certificate. The sale certificate before the amendment showed that one of the lots sold consisted of usufructuary mortgage right under a document of 1884. The learned Subordinate Judge has ordered that the sale be amended by adding a reference to a later usufructuary mortgage-bond of the year 1915. Now, it has been held by this Court in A. I. R. 1942 Pat. 328¹ that when questions involved are of contentious nature, S. 152, Civil P. C., cannot be invoked to justify an amendment. That case also was one relating to a dispute regarding the description of a property covered by an execution sale, and I cannot agree with the view of the learned Subordinate Judge in the present case that no contentious matters are involved. It may have appeared to him clear that the merits of the dispute lay on one side. That is not the same thing as saying that the matters were not contentious. Clearly in the present instance a usufructuary mortgage right of the value of about Rs. 1000 depends on the answer to the question whether the right covered by the usufructuary mortgage bond of 1915 was put up for sale and sold. I do not desire to express any opinion on the merits, but I am quite satisfied that this is not a case in which S. 152, Civil P. C., can be invoked in the absence of any authoritative determination of the rights of the parties. In the circumstances, the order of the learned Subordinate Judge for amendment of the sale certificate is set aside. The respondent-applicant will, however, be allowed three months from today in which to file a suit to establish his right, and meanwhile the application for amendment of the sale certificate will remain pending. If the applicant respondent notifies to the original Court that such a suit has been filed within four months from today, then the application will remain pending until the disposal of that suit. Otherwise the application will stand dismissed on the expiry of the four months from today. The petitioner before me is allowed the costs of this Court. Hearing fee: one gold mohur.

V.R./D.H.

Order set aside.

1. ('42) 29 A. I. R. 1942 Pat. 328 : 198 I. C. 672, Ramsankar Bandopadhyaya v. Khudiram Dutt.

[Case No. 80.]

A. I. R. (33) 1946 Patna 191

SINHA J.

Kula Chandra Dutt—Petitioner

v.

Emperor.

Criminal Misc. Cases Nos. 323 and 378 of 1944, Decided on 30th January 1945, from order of Dist. Magistrate Santhal Parganas, Dumka, D/- 26th July 1944.

(a) Criminal P. C. (1898), S. 561-A — Sub-Divisional Magistrate getting information that there was dispute between two persons about right to possession of electric supply company, requisitioning same under R. 75A (1) of Defence of India Rules—Order cannot be said to be passed in judicial proceeding and High Court cannot interfere under S. 561-A.

Section 561 A, comes into operation only when the impugned order is passed by a "Court." If the order moved against in the High Court is one passed by an executive officer of the Crown in his administrative capacity, S. 561-A is not attracted.

[P 195 C 1]

Where a Sub-Divisional Magistrate getting information that there is a dispute regarding the right to possession of a going concern, i. e., an electric supply company, in which the public is vitally interested, requisitions that concern under R. 75A (1) of Defence of India Rules and subsequently hands over possession to one of the disputants, the order passed by him cannot be said to be an order passed in a judicial proceeding even though he has taken this action during the pendency of a criminal proceeding instituted by one of the disputants against the other but not in the proceeding itself. Hence the High Court cannot interfere under Section 561A, Criminal P. C.

[P 195 C 1]

(b) Criminal P. C. (1898), S. 561A—Order of executive officer in excess of his powers — Person aggrieved failing to seek his remedy in accordance with law, i. e. through ordinary Courts — He cannot ask High Court to exercise its inherent powers.

It is true that even the executive officers of the Crown cannot interfere with the life or liberty of His Majesty's subjects except in strict accordance with the provisions of the law for the time being in force. If a person has been wronged by any orders of the executive authorities which are in excess of the powers conferred upon them, he has his remedy at law but that remedy has got to be sought in accordance with law, that is to say, through the ordinary Courts. Having failed to obtain such a remedy in the ordinary course of the law, he cannot come to the High Court and ask it to exercise its inherent powers.

[P 195 C 2 ;

P 196 C 1]

S. N. Dutta, P. B. Ganguly, R. J. Bahadur and N. Chatterji — for Petitioner.

Government Advocate — for the Crown.

Order. — These two applications arise out of the same matter, and have, therefore, been heard together, and will be disposed of by this judgment. In Cri. Misc. No. 323 the prayer is that the Cri. Misc. Case No. 148 of 1943, pending in the Court of the Sub-Divisional Officer of Deoghar, be transferred

to any other competent Magistrate for an expeditious hearing. In Cri. Misc. No. 378 the prayer is that the notice under R. 75A (1), Defence of India Rules, and all the orders subsequently passed by the Sub-Divisional Magistrate of Deoghar in pursuance thereof be set aside, and possession of the Electric Supply Company as a going concern be restored to the petitioner.

The facts and circumstances leading up to these applications, as alleged by the petitioner, are as follows: The petitioner and his deceased brother, Badal Chand Dutt, were carrying on an ancestral joint family business under the name and style of "Dutt & Bros." In February 1935, the said partners obtained a licence, described as "Deoghar Electric Licence 1935," for the supply of electric power to Deoghar. A limited liability company under the Companies Act was floated for financing the said licensees, and was styled as "Santhal Parganas Electric Supply Corporation Ltd." In January 1936, two agreements were entered into between the licensees and the company aforesaid whereby the licensees were to transfer the licence to the company, and the company was to grant the managing agency to the former. As these agreements were not given effect to, the licensees continued to work the licence aforesaid. In February 1943, Badal Chand Dutt aforesaid, one of the two partners, died, leaving him surviving his widow and three sons, who succeeded to the interest of the deceased member of the family in the joint family business. It was further alleged by the petitioner that the notification dated 23rd July 1943, by the Government of Bihar, showing that the partnership stood dissolved by virtue of the death of the said Badal Chand Dutt, and that, consequently, the said licence stood annulled, was entirely erroneous in law, and, therefore, ineffectual; but, all the same, the Provincial Government accorded sanction to the petitioner to engage in the business of supplying energy to Deoghar for one year with retrospective effect from 23rd February 1943. The petitioner alleges that he sent a letter of protest to the Government of Bihar against the said notification of 23rd July 1943, annulling the licence. He alleged further that he continued working the undertaking, including the power house, and supplying electrical energy to Deoghar as before.

In September 1943, one Pulin Chandra Daw instituted a suit, being Suit No. 1439 of 1943, on the original side of the Calcutta

High Court, claiming damages against the petitioner, the plaintiff in that suit being described as "Santhal Parganas Electric Supply Corporation Ltd." It is said that, in that plaint the plaintiff admitted the petitioner's possession of the power house, etc. The very next day after the institution of the suit, that is, on 24th September 1943, the plaintiff obtained an *ex parte* order granting an *interim* injunction. It is further alleged that the said Pulin Chandra Daw, without waiting for the final orders of the Calcutta High Court in the injunction matter, came to the power house at Deoghar on 18th October 1943, and made a serious attempt to take forcible possession of the business. The petitioner's engineer, Mr. D.N. Chatterjee, filed an application before the learned Sub-Divisional Magistrate of Deoghar, informing him of the said attempt to take forcible possession of the power house. The petitioner also, on his arrival from Calcutta, informed the Sub-Divisional Magistrate on 21st October 1943, about the activities of the said Pulin Chandra Daw. On 22nd October 1943, in the evening, the learned Sub-Divisional Officer is said to have gone to the power house and passed an order requisitioning the undertaking including the power house under R. 75A (1), Defence of India Rules. The order is set out as Ex. C to the petition, and runs as follows:

"Whereas a dispute has arisen over the ownership of the Electric Supply Company and consequently its power house and office etc., between K. C. Dutta the Grantee of the Deoghar Electric Supply Undertaking on one side and Mr. P. C. Daw's Agency Managing agent of Santhal Parganas Electric Supply Corporation Ltd. on the other side and, I am satisfied after due enquiry that it may impair efficiency or impede the working of, or cause damage to, the power house and its machinery at Williams Town and its store office and other appliances at Bone Villa, Carstairs town causing thereby the non supply of electric energy to the consumers in particular and public in general, now there, in exercise of the power conferred upon me by R. 75A (1), Defence of India Rules, I hereby decide to requisition the said Power House together with the store, appliances and offices etc.

I hereby further order that the said Power House be run with the existing working staff for a regular supply of electric energy to the public in general and consumers in particular the contravention of which is punishable under R. 78A (1) (3) of the said Rules.

I further direct that if any person contravenes any of the above order or does any act with intent to impair the efficiency or impede the working of or causes damage to the power house, its machinery, store and other appliances affecting the supply of the electric energy which is an essential commodity to the life of the community will be liable for prosecution under R. 35 (1) (a) and (d) read with sub-r. (4) of the said Rule.

Given under my hand and the seal of this Court today 22nd October 1943.

(Sd.) P. S. Sing.

(Seal).

22nd October 1943.

Sub-Divisional Magistrate, Deoghar.

To

22nd October 1943.

Mr. K. C. Dutta."

It is this requisition order and the subsequent orders, hereinafter to be noticed, which are challenged as illegal and null and void in Cri. Misc. Case No. 378 of 1944. It may be mentioned here by the way that before the said order was passed by the learned Sub-Divisional Magistrate, two hours earlier the same day, the said P. C. Daw had appeared before him and made a complaint about assault on his men. On 22nd November 1943, the *interim* injunction matter came up for hearing before the Calcutta High Court. The *interim* order of injunction was made absolute, subject to certain variations, exceptions being made for the working of the business of the electric supply and also providing that the order was without prejudice to the rights of the parties. It is claimed by the petitioner that, as a result of the orders of the Calcutta High Court in the injunction matter arising out of the suit aforesaid, his possession continued as before. The learned Sub-Divisional Magistrate instituted criminal proceedings against the petitioner and his men for certain offences said to have been committed against the men belonging to P. C. Daw's party. He also initiated proceedings under S. 107, Criminal P. C., which were dropped on 20th June 1944. In those criminal proceedings, enquiries were made by the Inspector of Police and the Deputy Superintendent of Police, and it is claimed by the petitioner that their reports were in favour of the petitioner, to the effect that he was in actual possession of the Deoghar Electric Supply Undertaking. It may also be mentioned that the criminal prosecution launched as a result of the complaint filed by Mr. P. C. Daw against the petitioner and his men ended in the acquittal of the accused, the learned trial Magistrate at Deoghar coming to the conclusion that the complainant was not in possession of the Deoghar Electric Power House and its office, and that, therefore, the accused persons did not commit any rioting, as alleged by the complainant. The judgment of acquittal is dated 25th July 1944.

In the meantime, the petitioner made an application to the Sub-Divisional Officer of Deoghar on 27th December 1943, challenging the validity of the requisition under the

Defence of India Rules, and praying for restoration of possession and certain other reliefs. This application was numbered as Cri. Misc. Case No. 148 of 1943. From the order-sheet, attached to the supplementary affidavit as Ex. 12 at pp. 29 and 30, it would appear that the matter has been adjourned to ten different dates between 15th January 1944 and 22nd June 1944, but had not been disposed of till then. The petitioner alleges that, failing in all his attempts to obtain any orders from the learned Sub-Divisional Officer of Deoghar, he moved the District Magistrate of the Santhal Parganas for the transfer of the Cri. Misc. Case No. 148 of 1943 to some other Court. On 26th July 1944, this application for transfer was rejected by the District Magistrate, chiefly on the ground that "the proceedings before the Sub-Divisional Officer do not come under the Criminal Procedure Code, though it has been styled as a criminal miscellaneous case." Against this order of the learned District Magistrate of the Santhal Parganas, the petitioner moved this Court, and obtained a rule, which has been numbered as Cri. Misc. Case No. 323 of 1944, on 25th August 1944.

As the petitioner felt aggrieved by the actions taken by the learned Sub-Divisional Officer of Deoghar in requisitioning the Electric Supply Undertaking, and, in not coming to any conclusions as regards his applications aforesaid in the said matter, he served a notice on the Provincial Government of Bihar on 3rd January 1944. On 29th February 1944, the Provincial Government of Bihar issued two notifications, namely, (1) according sanction to the petitioner for one year from 22nd February 1944, to engage in the business of supplying energy to Deoghar in accordance with the previous licence of 1935, and (2) according sanctions to the Santhal Parganas Electric Supply Corporation Ltd., for two years for the same purpose in the same area, but adding in the second notification that "the operation of this sanction by the grantees shall be subject to any orders passed or directions given by a competent Court."

On 27th March 1944, the petitioner as also his nephews instituted a suit against the Province of Bihar for certain declarations as also for an injunction restraining defendant 1, namely, the Province of Bihar, and its officers, servants and agents from interfering with the enjoyment of the rights granted by the Deoghar Electric Licence of 1935. This suit was filed in the Court of the Subordinate Judge at Deoghar, and was

numbered as Title Suit No. 2 of 1944. The petitioner alleges that the filing of this suit against the Provincial Government had just the opposite effect of what was intended by the plaintiffs. On 30th May 1944, during the petitioner's temporary absence, the learned Sub-Divisional Magistrate of Deoghar himself went to the place, and gave possession of the power house, etc., to the said Mr. P. C. Daw, without giving the petitioner any opportunity of showing cause against this proposed action by the learned Sub-Divisional Magistrate. It is against these acts of the Sub-Divisional Magistrate of Deoghar that the petitioner moved this Court, and obtained the rule which has been numbered as Crim. Misc. No. 378 of 1944. These applications have been made to this Court on the assumption that the several orders passed by the Sub-Divisional Magistrate of Deoghar and his actions taken in pursuance thereof were orders passed and actions taken by a "Court." Hence, it is manifest that, unless it can be established that the aforesaid orders passed by the learned Sub-Divisional Magistrate, and in the one case by the District Magistrate, were orders passed in a judicial proceeding, this Court cannot be asked to interfere. It is contended on behalf of the petitioner that under S. 561A, Criminal P. C., this Court has inherent power "to prevent abuse of the process of any Court or otherwise to secure the ends of justice." This contention again presupposes the same thing, that is to say, that the Sub-Divisional Magistrate, while acting under the Defence of India Rules, was amenable to the revisional jurisdiction of this Court or that, at any rate, the Court could interfere under its power of superintendence, as suggested by the learned counsel for the petitioner. In this connection the following order of the learned Sub-Divisional Magistrate of Deoghar, passed on 27th December 1943, is relied upon on behalf of the petitioner :

"I shall examine the record of the rioting case in consequence of which the Power House was requisitioned by me under R. 75 (1), Defence of India Rules. Put up on 15th January 1944 with the case."

Counsel for the petitioner, realising his difficulty that the orders passed by the learned Sub-Divisional Magistrate under the Defence of India Rules may not directly come under the purview of the criminal revisional jurisdiction of this Court, contended that the electric concern aforesaid had been requisitioned, and, subsequently, possession thereof transferred from the peti-

tioner to Mr. P. C. Daw aforesaid, in consequence of the case of rioting started by Mr. Daw against the petitioner and his men. Therefore, it was contended that the learned Sub-Divisional Magistrate acted as a "Court" in passing the order of requisition of the electric concern and in dispossessing the petitioner and handing over possession to Mr. Daw. It was not contended that all these orders could have been legally passed by the Sub-Divisional Magistrate acting within the limits of his powers as laid down in the Defence of India Rules. It was also contended that the delegation of powers was made in favour of the "Sub-Divisional Officer," and not the "Sub-Divisional Magistrate," and, therefore, the Sub-Divisional Magistrate had no jurisdiction to act as such under R. 75A, Defence of India Rules. In my opinion, there is no substance in this contention. The notification in question appears in the Bihar Gazette, Extraordinary, dated 9th May 1942. It shows that the Governor of Bihar was pleased to direct that the powers under R. 75A, Defence of India Rules, shall be exercised by the authorities specified in col. 1 of the schedule annexed to the notification, which includes "Sub-Divisional Magistrate." In col. 2 of the schedule, which is meant for showing the classes of property and the conditions subject to which the power has to be exercised, the following entry appears :

"Any movable or immovable property within their respective jurisdictions subject, in the case of any Sub-Divisional Officer, to the control of the District Magistrate."

There cannot be the least doubt that the notification in question refers in col. 1 to the "Sub-Divisional Magistrate," though in col. 2 it refers to the "Sub-Divisional Officer." It was then contended that the Sub-Divisional Magistrate, acting as a "Court," took cognizance of the rioting case on the complaint of Mr. P. C. Daw which resulted in the prosecution, and ultimately of the acquittal, of the petitioner and his men. During the course of this prosecution the learned Magistrate, a few hours after taking cognizance of the case, proceeded to requisition the electrical concern. It is, therefore, argued that the learned Sub-Divisional Magistrate of Deoghar had decided to take action under the Defence of India Rules as a "Court," and not as an executive officer under the Crown. In this connection reliance was placed upon the cases in 50 ALL. 414¹

1. (28) 15 A.I.R. 1928 All. 14 : 50 All. 414 : 105 I. C. 815, Hafiz-ud-din v. Laborde.

and 51 ALL. 377² in support of the proposition that the High Court is competent under the provisions of S. 561A, Criminal P. C., to grant appropriate relief to an aggrieved litigant. But, as I have observed above, S. 561A comes into operation only when the impugned order is passed by a "Court." If the order moved against in the High Court is one passed by an executive officer of the Crown in his administrative capacity, in my opinion, S. 561A is not attracted. In the present case it may be that the learned Sub-Divisional Magistrate, getting information that there was a dispute between two private individuals about the right to possession of a going concern in which the public was vitally interested, decided to take action under the Defence of India Rules. This action he took during the pendency of a criminal case; but that action he took not in the case itself. Hence, any orders passed by him transferring possession from party to another, rightly or wrongly, cannot be said to be an order passed in a judicial proceeding. All the cases cited above, relied upon by counsel for the petitioner, were cases in which the police or the Magistrate himself had passed certain orders purporting to act under the Code of Criminal Procedure. Hence, their orders and their actions in pursuance of their orders were held liable to be revised by the High Court under its inherent jurisdiction as recognised by S. 561A of the Code.

It was then contended that, even assuming that the learned Sub-Divisional Magistrate acted as an executive officer of the Crown, his actions were *ultra vires* of the Defence of India Rules, and, therefore, his orders could be revised by this Court under its inherent jurisdiction. In support of this argument it was urged that the Deoghar Electric Supply Undertaking was a going concern, and it has been laid down by a Full Bench of the Lahore High Court in I. L. R. (1943) Lah. 617³ that under R. 75A, Defence of India Rules, movable and immovable property only can be requisitioned or acquired and that rule is not applicable at all to the requisition or acquisition of an undertaking or a going concern. There may be some force in the contention that the requisition order passed by the learned Sub-Divisional Magistrate of Deoghar, if it

was in respect of a going concern, was *ultra vires*. But, as a civil suit between the petitioner and the Provincial Government of Bihar is pending, it is neither necessary nor expedient to express any considered opinion on that aspect of the case. But, assuming for the purposes of the present argument that the orders aforesaid are *ultra vires* the Sub-Divisional Magistrate, does it follow as a necessary corollary that this Court can interfere in its revisional jurisdiction and order the Provincial Government to restore the petitioner to possession of the concern? It was contended that where there is a wrong there is a remedy and that, if the executive authority exceeded its powers given under the law, the aggrieved party has his relief. In this connection the decision of their Lordships of the Judicial Committee of the Privy Council in 1931 A. C. 662⁴ was referred to. The following observations of Lord Atkin at p. 670 of the report have been strongly relied upon in this connection :

"Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

There cannot be the least doubt that even the executive officers of the Crown cannot interfere with the life or liberty of His Majesty's subjects except in strict accordance with the provisions of the law for the time being in force. If the petitioner has been wronged by any orders of the executive authorities which are in excess of the powers conferred upon them, he has his remedy at law; but that remedy has got to be sought in accordance with law, that is to say, through the ordinary Courts. In this connection it is relevant to point out that the petitioner has, as a matter of fact, sought his remedy by instituting the suit in the Court of the Subordinate Judge at Deoghar. If he had been vigilant in pursuing his remedy provided by law, he could have obtained such orders by way of injunction, as the law provides for, in that suit itself. As

2. ('28) 15 A. I. R. 1928 All. 756 : 51 All. 377 : 113 I. C. 78, Emperor v. Bhairon Prasad.

3. ('43) 30 A. I. R. 1943 Lah. 41 : I. L. R. (1943) Lah. 617 : 205 I. C. 337 (F.B.), Lahore Electric Supply Co. v. Punjab Province.

4. ('31) 18 A.I.R. 1931 P. C. 248 : 132 I. C. 739 : 1931 A. C. 662 : 100 L. J. P. C. 152 : 145 L. T. 297, Eshugbayi Eleko v. Nigerian Government.

already indicated, he did make a prayer for injunction in the suit itself; but he does not appear to have moved the Court for an interim injunction restraining the executive authorities from interfering with his rights such as they were. Having failed to obtain such a remedy in the ordinary course of the law, can the petitioner come to the High Court, and ask it to exercise its inherent powers? In my opinion, the answer is in the negative. In this dispute the petitioner, the Provincial Government and its officers as also Mr. P. C. Daw aforesaid are primarily concerned. Mr. P. C. Daw is not a party to these proceedings. Hence, in my opinion, even on the assumption that the orders of the learned Sub-Divisional Magistrate of Deoghar were wholly without jurisdiction from beginning to end, this Court cannot interfere for the simple reason that he was not functioning as a "Court" when he passed those orders. It follows from what has been said above that both these applications are misconceived and should be dismissed.

D.S./D.H. *Applications dismissed.*

[Case No. 81.]

* A. I. R. (33) 1946 Patna 196

SHEARER AND PANDE JJ.

Hadibandhu Padhan and others
Petitioners

v.

Emperor.

Criminal Revn. Nos. 207, 211 and 212 of 1944, and 108 of 1945 (Cuttack), Decided on 7th September 1945, from order of Dist. Magistrate, Cuttack, D/- 20th November 1944.

(a) Criminal P. C. (1898), Ss. 439, 491 and 561A — Person arrested under extradition warrant challenging validity of such warrant enlarged on bail — High Court can act under S. 439 or S. 561A if not under S. 491.

If the High Court cannot, strictly speaking, act under S. 491, where a person arrested under an extradition warrant challenging the validity of such warrant is not in custody, being enlarged on bail, it can act under S. 439 or S. 561A : ('29) 16 A. I. R. 1929 Bom. 81, *Rel. on.* [P 197 C 1]

Cr. P. C. —

('41) Chitaley, S. 435, Note 17; S. 491, Note 2 and S. 561A, Note 5, Pt. 5.

('41) Mitra, Paras. 1172, 1173.

(b) Extradition Act (1903), S. 7 — Political Agent — Political Agent includes Assistant Political Agent — Warrant signed by latter is valid.

The expression "Political Agent" in S. 7 must be construed in the light of cl. (40) of S. 3, General Clauses Act. An Assistant Political Agent is clearly an officer who answers the description in cl. (40). Therefore, an extradition warrant in pursuance of which a person is arrested is not invalid because it is signed not by the Political Agent but by the Assistant Political Agent. [P 197 C 2]

(c) Criminal P. C. (1898), S. 537 — Designation of officer to whom extradition warrant is addressed not correctly given — Same person holding both posts — Defect is cured under S. 537.

When an extradition warrant which ought to have been addressed to the Deputy Commissioner, Angul, was addressed to the District Magistrate of Cuttack but the same person held both these offices:

Held that if the designation of the officer to whom the warrant was addressed was not correctly given, this was purely a technical defect and could be cured by the provisions contained in S. 537.

[P 197 C 2; P 198 C 1]

Cr. P. C. —

('41) Chitaley, S. 537, Note 9.

('41) Mitra, Para. 149.

(d) Extradition Act (1903), S. 8A — District Magistrate reporting to Provincial Government and not to Central Government—There is no illegality.

The notification issued by the Central Government on 1st April 1938, under S. 124 (1), Government of India Act, 1935, by which the Central Government entrusted to all Provincial Governments, with their consent, the functions of the Central Government under certain sections of the Extradition Act, including S. 8A, is not *ultra vires*. Hence a District Magistrate in making a report under S. 8A to the Provincial Government and not to the Central Government commits no illegality. [P 198 C 1]

(e) Extradition Act (1903), Ss. 5 and 15 — Surrender of prisoner—Executive has discretion in matter — For valid reasons executive may cancel warrant.

In this country, as in every other country, the Legislature has imposed restrictions on the power of the executive to send persons abroad to answer charges before a foreign tribunal. For instance, the offence with which they are charged must be an extraditable offence and there must be in existence a warrant which is *ex facie* a valid warrant. [P 198 C 1]

If the executive exceeds its powers, the judiciary, and the High Court in particular, will restrain it; but when the conditions laid down by the Legislature as a pre-requisite to extradition are fulfilled, and the judiciary has no power to intervene, the executive is, nevertheless, under no legal compulsion to surrender the prisoner. It retains a discretion in the matter, and may, for reasons which appear to it to be valid reasons, cancel any warrant which has been issued. That is made clear by the provisions contained in Ss. 5 and 15 of the Act : (1696) 1 Q. B. 108, *Ref.* [P 198 C 2]

(f) Criminal P. C. (1898), S. 491 — Person arrested under extradition warrant—Application under S. 491 — Assurance that Court trying such person would not be biased is not sufficient ground for rejecting application.

Where a person arrested under an extradition warrant applies under S. 491, the fact that the High Court is assured that the tribunal by which he would ultimately be tried is not likely to be biased against him is a matter of quite secondary importance for rejecting the application. The real question at issue is whether or not sufficient grounds have been made out for depriving him of his liberty and sending him out of British India to answer a charge before a State tribunal. [P 199 C 1]

Cr. P. C. —

('41) Chitaley, S. 491, N. 7.

('41) Mitra, Page 1599, Para. 1298.

H. Mahapatra and P. C. Chatterji — for Petitioners, in Nos. 207, 211 and 212, and No. 108, respectively.

Public Prosecutor, and Advocate-General — for the Crown, in Nos. 207, 211 and 212; and No. 108 respectively.

Shearer J. — The petitioners have been arrested under warrants issued, in the case of four of them, by the Political Agent, Eastern States Agency, and in the case of the fifth by the Assistant Political Agent, Eastern States Agency. The warrants against the petitioners Hadibandhu Padhan, Purna Chandra Padhan and Khetrabasi Behara alias Batu Padhan were issued on 19th April 1943, and required them to be arrested and sent to the Court of the Special Judge at Talcher to answer a charge under S. 397, Penal Code. The warrant against Ghasinath Behara was issued two days later, and required him to be produced in the same Court to answer the same charge. The warrant against the remaining petitioner, N. K. Murty, was issued on 18th October 1944, and required him to be produced in the Court of the Sub-Divisional Magistrate of Dhenkanal to answer a charge under S. 395, Penal Code. The warrants were in each case addressed to the District Magistrate of Cuttack, and when the petitioners were arrested and brought before the learned District Magistrate they made certain statements. In consequence of these statements the learned District Magistrate, quite properly, made a report to the Government of Orissa under S. 8A, Extradition Act. In due course the Government of Orissa considered this report and finally directed the learned District Magistrate to send the petitioners to Talcher and Dhenkanal respectively. The learned District Magistrate then called on the petitioners, who had in the meantime been enlarged on bail, to surrender. Instead, however, of surrendering, the petitioners made these applications which were admitted by a Division Bench consisting of Sinha and Das, JJ. I am inclined myself to think that the applications, when made, were clearly premature and that the Bench ought to have directed the petitioners to surrender to their bail and then to have had the applications moved. This point is not, however, one of any great importance as there is authority for the view that if this Court cannot, strictly speaking, act under S. 491, Criminal P. C., as the petitioners are not in custody it can act under S. 439 or S. 561-A: *A. I. R. 1929 Bom. 81*.¹

1. ('29) 16 A. I. R. 1929 Bom. 81 : 53 Bom. 149 : 117 I. C. 321, *In re Bai Aisha*.

Each of the warrants has been duly sealed and it is not denied that they were signed respectively by the Political Agent and the Assistant Political Agent to the Eastern States Agency. It is, however, contended that the warrant in pursuance of which the petitioner N. K. Murty was arrested was *ex facie* an invalid warrant as it is signed not by the Political Agent but by the Assistant Political Agent. The expression 'Political Agent' in S. 7, Extradition Act, must, however, be construed in the light of cl. (40) of S. 3, General Clauses Act. That clause states that

"Political Agent shall include . . . any officer appointed to exercise all or any of the powers of a Political Agent at any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction."

The Assistant Political Agent is, quite clearly, an officer who answers that description. I may say that in order to remove any doubt which might exist on the point we asked the learned Advocate-General to ascertain whether, and the learned Advocate-General has ascertained that, the Assistant Political Agent has been specifically authorised to sign extradition warrants for the Dhenkanal states. The warrants under which the remaining petitioners were arrested are challenged on a different ground, namely, that they were addressed to the District Magistrate of Cuttack, whereas they ought to have been addressed to the Deputy Commissioner of Angul. In enacting S. 7, Extradition Act, the Legislature would seem to have had in mind the provisions contained in sub-s. (1) of S. 10, Criminal P. C. The Angul Sub-division was, however, constituted into a district by the Angul Laws Regulation, 1936, and cl. (c) of S. 2 of this Regulation states that

"'Deputy Commissioner' means the officer appointed by the Local Government to hold chief executive charge of the district by whatever other title he may be designated."

Now, immediately after this Regulation received the assent of the Governor-General, the Government of Orissa issued a notification appointing "the Collector of Cuttack to be the *ex officio* Deputy Commissioner of Angul." I am somewhat at a loss to understand why this was done or why this particular phraseology was adopted. It is, however, plain that the person who from time to time holds the office of Collector also holds the office of Deputy Commissioner of Angul. The officer to whom the warrants were sent and who caused them to be executed was Mr. L. P. Singh, and under cl. (7) of S. 57, Evidence Act, this

Court is entitled to take judicial notice of the notification published in the Orissa Gazette on 30th June 1942, under which Mr. Singh was appointed to be District Magistrate as well as Collector of Cuttack. It is thus perfectly clear that the warrants were in fact directed to the officer who alone was competent to execute them, and moreover, that in sending them to Cuttack instead of to Angul the Political Agent was correct, as S. 61 of the Angul Laws Regulation authorises the Deputy Commissioner to hold his Court at any place in Angul or in the District of Cuttack. If the designation of the officer to whom the warrants were addressed was not correctly given, this is a purely technical defect and is cured by the provisions contained in S. 537, Criminal P. C.

As I have said, the learned District Magistrate made reports to the Provincial Government under S. 8A, Extradition Act. Mr. H. Mahapatra, for the petitioners, has pointed out that by the Adaptation of Indian Laws Order the words "Central Government" were substituted for the words "Local Government" in that section. Mr. Mahapatra went on to suggest that in making report to the Provincial Government the learned District Magistrate had committed an illegality, and that any proceedings subsequent to the occurrence of of this illegality should be set aside. It appears, however, that on 1st April 1938, the Government of India issued a notification under sub-s. (1) of S. 124, Government of India Act, 1935, by which it entrusted to all Provincial Governments, with their consent, the functions of the Central Government under certain sections of the Extradition Act, and among them S. 8A. When this notification was brought to his notice the learned advocate suggested that it was *ultra vires* as the functions thereby entrusted to the Government of Orissa were not executive but judicial functions. There is clearly no substance in this argument. In (1896) 1 Q. B. 108² Lord Russell of Killowen emphasised the distinction between what he called the political aspect and the strictly judicial aspect of extradition. In this country, as in every other country, the Legislature has imposed restrictions on the power of the executive to send persons abroad to answer charges before a foreign tribunal. For instance, the offence with which they are charged must be an extraditable offence and there must be in existence a warrant

which is *ex facie* a valid warrant. If the executive exceeds its powers, the judiciary, and this Court in particular, will restrain it, but when the conditions laid down by the Legislature as a pre-requisite to extradition are fulfilled, and the judiciary has no power to intervene, the executive is, nevertheless, under no legal compulsion to surrender the prisoner. It retains a discretion in the matter, and may, for reasons which appear to it to be valid reasons, cancel any warrant which has been issued. That is made clear by the provisions contained in Ss. 5 and 15, Extradition Act. In (1896) 1 Q. B. 108² the prisoner was charged with having committed embezzlement and certain other offences. One of the grounds on which he resisted the demand for his extradition was that it was not sought in good faith and in the interests of justice but that the charges had been preferred against him merely as a pretext in order to enable the French Government to get control over him and take action against him for his political activities. The depositions which had been sent to England apparently made out a *prima facie* case that he had committed the offences with which he was charged, and in declining to entertain this ground the Lord Chief Justice said:

"This question bears on the political aspect of extradition, and it must be determined upon a consideration of matters into which this Court is not competent and has no authority to enter. Such considerations, if they exist at all, must be addressed to the executive of this country, they cannot enter, and ought not to enter, into the judicial consideration of this question, which in this case turns solely upon the construction of the Extradition Act and the treaty."

I refer to the decision in (1896) 1 Q. B. 108,² as one of the grounds on which the petitioners resist the demand for their extradition is very similar to the ground which was put forward in that case and which the Court declined to entertain. The petitioner, N. K. Murty for instance, was employed as a station master at a station on the Bengal Nagpur Railway in Dhenkanal. In that capacity he was in a position to know what grain was exported from or imported into the State and by whom it was exported or imported. According to him, he declined to communicate his knowledge to certain dignitaries of the State and thereby incurred their resentment. He admits that while he was in Dhenkanal some kind of fracas occurred between himself and some other railway employees and a youth named Muhammad Ayub, and that in this fracas Muhammad Ayub was either deprived of or

2. (1896) 1 Q. B. 108 : 65 L. J. M. C. 23 : 73 L. T. 687 : 44 W. R. 238, *In re Arton*.

lost possession of a cycle. N. K. Murty suggests that this incident has in some way or other been misrepresented to the Assistant Political Agent who issued the warrant for his arrest. If the incident had occurred in a foreign State and not, as it did, in an Indian State, and if the learned District Magistrate had had to deal with the matter under Chap. II, and not, as he did, under Chap. III, Extradition Act, he would, in the first place, have had the depositions of Muhammad Ayub and the other persons, who are to give evidence against the petitioner N. K. Murty, before him, and, in the second place, N. K. Murty would have been entitled not merely to make a statement but also to call the other railway employees who were concerned in the incident, or other persons who saw it, to say what actually occurred. The learned District Magistrate would, on a consideration of the whole of this body of evidence, have had to determine whether or not a *prima facie* case had been made out. The Assistant Political Agent presumably had the depositions of Muhammad Ayub and the other persons who are to give evidence at the trial before him, and possibly these depositions may have been enough to make out a *prima facie* case against the petitioner. If, however, the petitioner had been in a position to appear before the Assistant Political Agent and to call evidence on his behalf, the Assistant Political Agent might have arrived at a very different conclusion. This aspect of the matter will, I have no doubt, be considered by the Provincial Government if an application is made to it by N. K. Murty, or indeed, the other petitioners, to cancel the warrants under S. 15, Extradition Act. It appears that an application under S. 491, Criminal P. C., was made to the Revenue Commissioner sitting as the High Court for Angul and that one of the grounds on which it was dismissed was that the Revenue Commissioner was assured that the tribunals by which the petitioners would ultimately be tried were not likely to be biased against them. This, I venture to suggest, is a matter of quite secondary importance. The real question at issue is whether or not sufficient grounds have been made out for depriving the petitioners of their liberty and sending them out of British India to answer a charge before the State tribunals.

If they are innocent, they will no doubt eventually be acquitted, but if they have, as they say, incurred the displeasure of the officials of these Darvars, they may, in the

meantime, be subjected to much harassment. In leaving it to the Political Agent to decide, on materials which must frequently be quite inadequate, whether or not a *prima facie* case has been made out, the Legislature has exposed the subjects of the Crown to the risk of being unnecessarily and unjustifiably deprived of their liberty. The only way in which injustice of this kind can be effectively prevented is by Provincial Governments taking care to inform themselves as best they can of the true facts and, where necessary, exercising the power conferred on them by the Legislature to cancel warrants. With these observations, I would dismiss the applications.

Pande J. — I agree.

V.R./D.H. *Applications dismissed.*

[*Case No. 82.*]

A. I. R. (33) 1946 Patna 199

CHATTERJI AND PANDE JJ.

Mandhata Jha and others — Appellants
v.

Muni Lal Thakur and others — Respondents.

Appeals Nos. 416 to 419 of 1944, Decided on 5th March 1945, from appellate orders of Sub-Judge, Muzaffarpur, D/- 14-9-44 and 15-11-44.

Bihar Money-lenders (Regulation of Transactions) Act (7 [VII] of 1939), S. 14, Proviso 1—Proviso does not mean that decree-holder may specify any portion of property which will not be sufficient to satisfy decree—Proviso must be read subject to first paragraph of S. 14.

The first proviso to S. 14 must be read subject to the first paragraph of the section which clearly says that only so much of the property shall be sold which will be sufficient to satisfy the decree. What the proviso means is that the decree-holder may specify any portion of the property, provided it is sufficient to satisfy the decree. It does not mean that the decree-holder may specify any portion which will not be sufficient to satisfy the decree.
[P 200 C 1]

Rai T. N. Sahay and Ramchandra Prasad —
for Appellants.
Bhabanand Mukherji — for Respondents.

Chatterji J. — These four appeals are by two sets of judgment-debtors. Appeals Nos. 416 and 417 are directed against an order fixing valuation of certain properties sought to be sold in execution of a decree. Appeals Nos. 418 and 419 are directed against an order directing that lots Nos. 2, 3 and 4 should be sold first and in case the sale proceeds thereof be insufficient to satisfy the decree, lot No. 1 be sold, and lastly, lot No. 5, if necessary. The decree under execution is a mortgage decree for Rs. 14,581-11-4. There were six lots of

properties covered by the decree. The Court acting under S. 13, Bihar Money-lenders Act, fixed the value of lot No. 1 to be Rs. 6000, lot No. 2 Rs. 3000, lot No. 3 Rs. 300, lot No. 4 Rs. 4000 and lot No. 5 Rs. 20,000. Thus the value of lots Nos. 2, 3 and 4 taken together comes to Rs. 7300. This is obviously insufficient to satisfy the decree; yet the Court below ordered that these three lots should be sold first. This is quite contrary to the provisions of ss. 13 and 14 of the Money-lenders Act. Section 14 says that :

"the proclamation of the intended sale of property in execution of a decree passed before or after the commencement of this Act in respect of a loan or the interest on a loan shall include only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree and shall state the value of the property or portion of the property to be sold, as determined under Section 13." Section 13 provides that the Court shall estimate the value of the property sought to be sold and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree. It is, therefore, clear that the Court after having estimated the value of the properties ought to have directed the sale of such property as would be sufficient to satisfy the decree. Mr. Bhabanand Mukherji on behalf of the respondents lays stress on the first proviso to S. 14, which runs as follows :

"Provided that if the property to be sold is immovable and the decree-holder specifies which portion of such property should be sold the Court shall order that such portion or so much of such portion as may seem necessary to satisfy the decree shall be sold."

It is said that this proviso gives an option to the decree-holder to specify which portion of the property should be sold. But this proviso must be read subject to the first paragraph of the section which clearly says that only so much of the property shall be sold which will be sufficient to satisfy the decree. What the proviso means is that the decree-holder may specify any portion of the property, provided it is sufficient to satisfy the decree. It does not mean that the decree-holder may specify any portion which will not be sufficient to satisfy the decree. In this case, as I have already shown, lots Nos. 2, 3 and 4 together, or even taken with lot No. 1, will not be sufficient to satisfy the decree. On the other hand, lot No. 5 has been valued at Rs. 20,000. About three-fourths of this property will be sufficient to satisfy the decree. Lot No. 5 is a 16 annas zemindary. Therefore, 12 annas of this lot will be sufficient to satisfy the decree. It is, however, urged by Mr. Mukherji that

this lot is not really worth Rs. 20,000, But the decree-holder has not challenged the valuation of this lot by way of an appeal. Any how on the valuation fixed by the Court itself, three-fourths of lot No. 5 may be expected to satisfy the decree. Mr. T. N. Sahay on behalf of the appellants submits that if lot No. 5 be ordered to be sold first, he will not press the appeals Nos. 416 and 417 which relate to valuation. I think that the proper order to be passed is that the Court below will proceed first to sell so much of lot No. 5 as will be sufficient to satisfy the decree. Appeals Nos. 416 and 417 are dismissed, while appeals Nos. 418 and 419 are allowed to the extent indicated above. Parties will bear their own costs.

Pande J. — I agree.

D.S./D.H.

Order accordingly.

[Case No. 83.]

A. I. R. (33) 1946 Patna 200

FAZL ALI C. J. AND RAY J.

Sir Kameshwar Singh—Appellant

v.

Janki Raman and others—Respondents.

Second Appeals Nos. 940 to 943 of 1943, Decided on 6th September 1945, from decision of Addl. Dist. Judge, Muzaffarpur, D/- 19th May 1943.

Bengal Cess Act (9 [IX] of 1880), Ss. 41 and 4 —Holding rent of which exceeded Rs. 100 split up into small holdings with consent of landlord—Rent for each holding less than Rs. 100 —Tenant is cultivating raiyat and not tenure-holder within S. 41.

The expressions "cultivating raiyat" and "tenure-holder" have a special meaning in the Cess Act, which is different from the meaning attached to them in the Bengal Tenancy Act. Hence, in suits for recovery of cess at certain rate what has to be found is whether the defendants are tenure-holders or cultivating raiyats in the sense in which these expressions are used in the Cess Act. [P 201 C 2]

The holdings in suit originally formed one holding of 155 bighas and the rent payable in respect thereof exceeded Rs. 100. Therefore the holding was valued as a tenure in the re-valuation proceedings. The holding was subsequently split up into four holdings with the consent and concurrence of the landlord; and since that time the rent in respect of each of the holdings was less than Rs. 100. The landlord claimed to recover cess under S. 41 (2), Cess Act:

Held, that the defendants were cultivating raiyats within the meaning of S. 4, Cess Act; and, the refore, they were liable to pay cess according to the rate fixed under cl. (3) of S. 41. [P 201 C 2]

Held also that it was open to the landlord not to consent to the splitting up of the holding in which case cess would have been payable under cl. (2) of S. 41; but the landlord having given his consent to the splitting up could not then refuse to treat the tenants of the different holdings as cultivating raiyats: ('27) 14 A. I. R. 1927 Pat 270, *Rel. on*; ('26) 13 A. I. R. 1926 Pat. 175 and ('38) 25 A.I.R. 1938 Pat. 362, *Ref.* [P 202 C 1]

L. K. Jha and S. P. Srivastava —
for Appellant.
B. C. De, P. N. Gour and J. C. Brahma —
for Respondents.

Fazl Ali C. J.—These appeals arise out of four suits to recover cess from 1345 to 1347 and for rent and cess for the year 1348. The question for determination by this Court is at what rate cess is payable by the defendants in each case. The defendants are at present tenants of four different holdings which are situated in village Gandhari and Lalbandi tauzi No. 6424. These four holdings came into existence sometime in the year 1346, but before that year they were parts of one holding of 155 bighas 12 kathas for which Rs. 115-9-0 was payable as jama and Rs. 7-3-6 was payable as cess. The original holding was entered in the record of rights as a "sharah moiyan holding," that is to say, a holding at a fixed rate of rent and was recorded to be in the possession of a single raiyat. In the course of the re-valuation of the estate, the holding was valued as a tenure and its value was fixed at Rs. 1629-15-0. Upon this value, the cess payable for the entire land comprising the present four holdings would be Rs. 101-14-0 and the case of the plaintiff landlord is that he is entitled to recover cess at this rate for the year 1348. As to the other year for which the suit has been brought the position is this : In certain previous suits the plaintiff has already recovered cess treating these four holdings as separate holdings and not as one tenure. He has now brought the present suits to recover the difference between the full cess which is payable according to him and the amount already realised by him. Thus the main question which arises in these suits is whether cess is payable in respect of the lands of these four holdings under cl. (2) of S. 41, or under cl. (3). Clause (2) fixes the rate at which cess is payable by the holder of a tenure whereas clause (3) fixes the rate at which cess is payable by a cultivating raiyat. The plaintiff's case is that inasmuch as the lands constituting the four holdings have been valued as a tenure therefore cess is payable at the rate fixed as in the case of a tenure, that is to say, it is payable at the rate of one anna in the rupee. On the other hand, the case of the defendants is that they are cultivating raiyats in the sense in which the expression is used in the Cess Act and cess is payable only at the rate of half anna in the rupee.

There is no dispute that the rate at which cess is payable is to be determined according to S. 41, Cess Act. The question which we

have to decide is whether the defendants are holders of a tenure or cultivating raiyats. It is stated in S. 4, Cess Act, that a "cultivating raiyat" means a person cultivating land and paying rent therefor not exceeding one hundred rupees per annum and that "tenure" includes every interest in land whether rent paying or not save and except an estate as above defined, and save and except the interest of a "cultivating raiyat." Thus the expressions "cultivating raiyat" and "tenure-holder" have a special meaning in the Cess Act which is different from the meaning attached to them in the Bengal Tenancy Act. Therefore all that has to be found in these cases is whether the defendants are tenure-holders or cultivating raiyats in the sense in which these expressions are used in the Cess Act. It is not disputed that since the time when these four holdings were created the rent payable in respect of each of them is less than Rs. 100. The rent of holding No. 523 is Rs. 35; that of holding No. 524 is Rs. 33-7-3; that of holding No. 525 is Rs. 34-1-9 and that of holding No. 526 is Rs. 13. Therefore there can be no doubt that the defendants are cultivating raiyats for the purpose of the Cess Act and therefore they are liable to pay cess according to the rate fixed under cl. (3) of S. 41.

It is contended on behalf of the appellant that a civil Court cannot go behind the valuation fixed in re-valuation proceedings and inasmuch as the lands of the four holdings were valued as a tenure, cess is payable upon the valuation so fixed. It is also pointed out that the plaintiff is the owner of the estate and when his estate was valued the lands comprising the four holdings were valued as a tenure and therefore a great injustice would be done to him if it is held that the defendants are to pay cess at a lower rate. This is precisely the argument which appears to have been put forward in *A. I. R. 1926 Pat. 175*¹ and in *17 Pat. 436*.² The learned Judge who decided the last mentioned case held following the earlier case that S. 93 debars a civil Court from questioning the valuation made by the revenue authorities under the Cess Act and a plea by the defendant that he is an occupancy raiyat and not a tenure-holder and that the valuation is wrong, is not entertainable by the civil Court. In my opinion, however, these decisions are clearly distinguishable.

1. (26) 13 A. I. R. 1926 Pat. 175 : 90 I. C. 621, *Kesho Prasad Singh v. Ram Swarup Abir*.

2. (38) 25 A. I. R. 1938 Pat. 362 : 17 Pat. 436 : 174 I. C. 752, *Braja Bihari Das v. Ram Narayan Rai*.

As I have stated, the present holdings originally formed one holding of 155 bighas and the rent payable in respect thereof exceeded Rs. 100. Therefore, the holding was valued as a tenure in the re-valuation proceedings. But they have since been split up into four holdings with the consent and concurrence of the landlord. It was open to the landlord not to consent to the splitting up of the holding in which case cess would have been payable under clause (2) of S. 41; but the landlord having given his consent to the splitting up cannot now refuse to treat the tenants of the different holdings as cultivating raiyats. Section 93 provides that every valuation made under Part II of the Cess Act shall be open to revision by the Commissioner and the Board of Revenue and not otherwise. The learned Additional District Judge who decided these appeals in the Court below has remarked as follows while dealing with this provision :

"The raiyats do not question the basis on which the recent valuation has been done. They cannot question it. All that they state is that being cultivating raiyats now, they can pay only half the enhanced cess as provided for by cl. (3) to S. 41, Cess Act."

In my opinion this observation furnishes the answer to the point in controversy. The defendants do not question the valuation but they merely claim that their status having changed they are now liable to pay cess under cl. (3) of S. 41. To test this conclusion, let us take a hypothetical case. Let us assume that after the re-valuation a certain tenure was resumed by the landlord and after the resumption the landlord proceeded to create a number of holdings each carrying a rental of less than Rs. 100. Obviously in such a case the landlord cannot claim cess from the new tenants treating them as tenure-holders in spite of the tenure having been originally valued as such. If he cannot claim cess upon that footing in this hypothetical case, I do not see why he should be allowed to claim a higher cess in the present case. In my opinion, the present case is fully covered by 6 Pat. 13.³ In that case there was a tenure of 300 bighas with an annual jama of Rs. 560. That tenure came to be held by a number of cosharer tenure-holders who subsequently agreed with the landlord that each should pay his share of the jama according to the amount of land he held in the tenure. Later on three suits were brought to recover cess and in each case the amount payable by the

defendants was less than Rs. 100. It was held that where a person cultivates land and pays rent not exceeding Rs. 100 per annum, such a person is a cultivating raiyat within the meaning of S. 4, Cess Act, irrespective of the character of his holding under the Bengal Tenancy Act, and he is liable to pay cess at half the rate paid by a tenure-holder. In this view I would uphold the decision of the learned Additional District Judge and dismiss these appeals with costs.

Ray J.—I agree.

R.K.

Appeals dismissed.

[Case No. 84.]

A. I. R. (33) 1946 Patna 202

MANOHAR LALL AND DAS JJ.

Bal gobind Prasad and others —

Defendants—Appellants

v.

Lila Kuer and another — Plaintiffs

— Respondents.

Appeal No. 154 of 1941, Decided on 18th September 1945, from original decree of Sub-Judge, Gaya, D/- 23rd August 1941.

(a) Limitation Act (1908), S. 16 and Arts. 138 and 144 — Property purchased at auction-sale and formal possession obtained — Suit by purchaser for actual possession — S. 16 and Art. 138 not applicable — Art. 144 applies.

Plaintiff obtained through an executing Court formal possession of the property purchased at an auction-sale and brought a suit for actual possession of the same after 12 years from the date when formal possession was given to him seeking to exclude under S. 16 the period during which the proceedings to set aside the sale were prosecuted :

Held (1) that S. 16 could be helpful only to an auction-purchaser who had not obtained possession through Court. As the plaintiff had obtained symbolical possession he could not avail of S. 16. [P 205 C 1]

(2) that Art. 138 had no application as the suit by the plaintiff was not one by an auction-purchaser but an ordinary suit for possession by the owner of the property whose title had become complete and effective by the confirmation of the sale and delivery of symbolical possession. [P 205 C 1, 2]

(3) that the possession of the defendant-judgment-debtor became adverse from the date of the delivery of symbolical possession and as the suit for possession was brought more than twelve years of that date it was barred under Art. 144: ('21) 8 A. I. R. 1921 Cal. 385 and ('32) 19 A. I. R. 1932 Pat. 145, *Rel. on*; ('17) 4 A. I. R. 1917 Cal. 802, *Disting.*; 5 Cal. 584 (F.B.), *Expl.* [P 205 C 2; P 206 C 2]

Limitation Act—

('42) Chitaley, Art. 138, Notes 7 and 8; Arts. 142 and 144, Notes 2 and 65.

(b) Hindu law—Widow—Property purchased by D in execution of a mortgage decree — Symbolical possession obtained — Will by D giving all property to his wife and also right to adopt son — After D's death his widow adopting son—Suit by widow in her own name

3. ('27) 14 A.I.R. 1927 Pat. 270 : 6 Pat. 13 : 102 I. C. 365, Abdul Hasan v. Taj Ali.

to obtain actual possession of property, held maintainable.

D, in execution of a mortgage decree, obtained against the defendants purchased the property in suit and had also got symbolical possession. By a will, *D* gave all his property to his wife and also a right to adopt a son. A son was adopted by the widow after *D*'s death, and she brought a suit to obtain actual possession of the property in suit:

Held that when *D* died there was no adopted son and hence the entire property vested in the widow and she could not be divested by subsequent adoption. By the terms of the will the widow became the absolute owner of the properties left by her husband, and subsequent adoption could not affect her right to sue in her own name. It was not necessary that she should have sued in her adopted son's name or on his behalf: ('33) 20 A. I. R. 1933 P. C. 155 and ('43) 30 A. I. R. 1943 P. C. 196, *Disting.*; ('27) 14 A. I. R. 1927 P. C. 139, *Rel. on.* [P 206 C 2; P 207 C 1]

Mahabir Prasad, Girjanandan Prasad, Girish Nandan Sahay Sinha, Ram Chandra Prasad and Jamuna Prasad Choudhuri —
for Appellants.

P. R. Das and R. S. Chatterji —
for Respondents.

Manohar Lall J. — In this appeal by the defendants the serious questions for decision are whether the plaintiff is entitled to maintain the suit after she had adopted a son to her deceased husband, and if so whether the suit is barred by limitation. The facts are not in dispute. On 28th February 1922, one Darbari Lal, in execution of a mortgage decree which he obtained against the defendants, purchased the property in suit. The judgment-debtors filed an application for setting aside the sale under Order 21, Rule 90, Civil P. C., but that application was dismissed on 27th June 1922 on which date the sale was confirmed. In September 1922 the sons of the judgment-debtor, Chaudhury Kashinath, instituted a title suit for a declaration that the mortgage transaction of 25th May 1911, which was the basis of the mortgage decree and sale, was not binding upon those plaintiffs as the money was raised for purposes illegal and immoral, and also for a declaration that the sale did not bind the interest of those plaintiffs. Darbari Lal, the auction-purchaser, was made defendant 31 in that suit. During the pendency of that suit, Darbari Lal died, but before his death Darbari Lal had obtained a formal delivery of possession on 14th August 1924. It appears that he never obtained actual possession. The suit instituted by the sons was dismissed on 31st March 1928, and an appeal to this Court was dismissed on 7th May 1936.

In pursuance to a will dated 17th April 1924, left by Darbari Lal, all his properties came into possession of his widow, Srimati

Lila Kuer, as the absolute owner. In the will, power was given to Srimati Lila Kuer to adopt a son. She adopted a son in accordance with the power granted to her by the will which was duly admitted to probate, but at the date of the institution of the present suit the adopted boy was a minor. On 6th May 1939, Lila Kuer instituted a suit giving rise to this appeal for recovery of possession of the properties of which the sale had been confirmed, as stated above, on 27th June 1922. It will be noticed that the suit is beyond twelve years of the date of the sale, and is *prima facie* barred by limitation. Limitation was sought to be saved by the application of S. 16, Limitation Act, which provides that in computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the proceeding to set aside the sale has been prosecuted, shall be excluded. The plaintiff sought to exclude the entire period between 12th September 1922 up to 7th May 1936. It is conceded that if this period is excluded, the suit is within time. It is to be, however, observed here that in the plaint it was not stated explicitly or by implication that Darbari Lal had obtained possession symbolical or otherwise of the properties in suit.

In the written statement the defendants specifically alleged in para. 3 (e) that after the purchase by Darbari Lal and dismissal of O. 21, R. 90, Civil P. C., application, Darbari Lal took formal delivery of possession through Court, and, in para. 5, it was pleaded that the predecessor of the plaintiff did not have khas possession over the properties in suit, and that the rights acquired by Darbari Lal in the execution sale had been lost by inaction, and that notwithstanding the institution of the title suit in 1922 Darbari Lal should have been active in obtaining possession and, therefore, the plaintiff cannot be allowed any exemption of the period during which that litigation was pending. Oral evidence was adduced on behalf of the defendants that the plaintiff had obtained delivery of possession. [After considering the evidence his Lordship proceeded.]

Under the provision of O. 41, R. 27, Civil P. C., an application supported by an affidavit has been filed in this Court in which it is prayed that a certified copy of delivery of possession dated 14th August 1924, should be taken into evidence, and the circumstances in which this certified copy could not be

produced in the Court below are stated in the application. The copy produced is a certified copy of a public document, and, in our opinion, it must be admitted in evidence. The defendants have satisfied us why it could not be produced earlier. Accordingly we have admitted this document into evidence and have marked it as exhibit 1. The learned advocate on behalf of the respondent could not seriously object to the admissibility of this document. After this document has been admitted into evidence, there is no difficulty in holding that Darbari Lal did actually obtain a formal delivery of possession in August 1924, and the finding of the learned Subordinate Judge to the contrary must be set aside as erroneous—the learned Subordinate Judge would have probably come to the same conclusion if this document was available at the time of the trial. The learned Advocate-General appearing on behalf of the defendant-appellants argued that when the delivery of possession, even though it was formal, has been effected, the provisions of s. 16, Limitation Act, are no longer available to the plaintiff. He relied upon the case in 26 C.W.N. 364¹ where the learned Judges of the Calcutta High Court held that after symbolical possession has been delivered Art. 138 has no application and that the proper Article to apply is Art. 144, Limitation Act, and when the latter Article applies no deduction of time can be given under s. 16, Limitation Act, or under the general principles of equity. This case is directly in favour of the contention raised by the learned Advocate-General.

Mr. P. R. Das on the other hand relied upon the case in 21 C.W.N. 304.² In that case the plaintiff became the auction-purchaser of certain lands in 1893. In 1895, the judgment-debtor instituted a suit for setting aside the decree and the sale and this litigation was decided by the Privy Council in favour of the decree-holder auction-purchaser in 1905. In the year 1909, the plaintiff instituted a suit for possession basing his cause of action in the year 1905 when the Privy Council decided the case in his favour. It was found in that case that the land was in possession of nobody between 1895 up to 1905. In these circumstances the learned Judges held that the suit of the plaintiff was not barred by limitation. They also decided that

1. (21) 8 A.I.R. 1921 Cal. 385 : 70 I.C. 420 : 26 C.W.N. 364, Brojendra Kumar Roy v. Ashutosh Roy.

2. (17) 4 A.I.R. 1917 Cal. 802 : 38 I.C. 547 : 21 C.W.N. 304, Promotha Nath Roy v. Kishore Lal.

s. 16, Limitation Act, applied and the plaintiff was entitled to deduction of the time spent in that litigation from 1895 to 1905, and that the word 'proceeding' is wide enough to include a suit. It was not noticed in any of the judgments of the Letters Patent Bench that the plaintiff had actually obtained formal delivery of possession, although Mullick J., who decided the case originally as a Single Judge, states at p. 306 that the learned Munsif found that the plaintiffs never obtained possession after their auction-purchase of 1893, but the learned Subordinate Judge found that the plaintiff did obtain possession within one year of 1893 and that although after this while litigation was going on they allowed the land to remain waste till 1905, they were in constructive possession during the whole of that period. Now if the plaintiffs were in constructive possession during the whole of the period, obviously their suit instituted in 1909 was within time. But, as I have said above, no argument was addressed to the learned Judges as to the effect of the possession having been taken by the plaintiffs in 1894 on the applicability of s. 16, Limitation Act. In my opinion, this case does not help the contention raised by Mr. Das.

On the other hand, there is a direct authority of this Court decided by a Division Bench in 11 Pat. 165.³ The identical question before us was decided there that where a formal delivery of possession has been taken by an auction-purchaser, the Article which applies is Art. 144, Limitation Act, and not Art. 138 or Art. 142. Khaja Muhammad Noor J. examined the matter elaborately and pointed out the confusion of thought which existed on account of the misunderstanding of the words symbolical and actual possession—words not used in the Code of Civil Procedure. Says the learned Judge at p. 173 that when once the Court has put the plaintiffs in possession of the property as auction-purchaser and the defendant continues in possession of it in spite of delivery of possession it is then and then only that the possession of the defendant becomes adverse. The plaintiff could not have gone and taken possession of the property either at the sale or even after the confirmation of it unless the Court put him in possession. At page 170 the learned Judge says that it was obvious to him that Art. 138 has no application as that Article applies to a suit instituted by an auction-purchaser against a judgment-debtor and, therefore,

3. (32) 19 A.I.R. 1932 Pat. 145 : 11 Pat. 165 : 142 I.C. 246, Ram Prasad Ojha v. Bindeshwari Prasad.

applies to a case in which there has been no delivery of possession by the executing Court as contemplated by Order 21, Civil P. C., and that the Article to be applied is Art. 144 as that regulates a suit for possession of immovable property or any interest therein not otherwise provided for in the Limitation Act. Wort J. at page 168 approved of this view in that he says that it was pointed out in the course of the argument that Art. 138 would apply in a case in which the decree-holder having purchased a property had failed to take advantage of the procedure under the Civil Procedure Code for the purpose of obtaining possession when the judgment-debtor was in possession, and in those circumstances he brings an action to obtain possession which he might have obtained under the Civil Procedure Code had he been so minded.

With respect I agree with the correctness of the decision in the Patna case. The words of S. 16, Limitation Act, are quite clear. It says that in computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree the time during which the proceeding to set aside the sale has been prosecuted shall be excluded. We must, therefore, turn to Sch. I to find out what is the period of limitation prescribed for such a suit. The only Articles which provide for the institution of such a suit are Arts. 137 and 138. The former Article says that for a suit by a purchaser at a sale in execution of a decree for possession when the judgment-debtor was out of possession at the date of the sale the period of limitation is twelve years from the time when the judgment-debtor was first entitled to possession. That Article has no application as in the present case the judgment-debtor was not out of possession at the date of the sale. Article 138 provides that the period of limitation for a similar suit if the judgment-debtor was in possession at the date of the sale is to be twelve years from the date when the sale became absolute. This is the position here—the judgment-debtor was in possession. In my opinion, on a plain reading of S. 16 and of Arts. 137 and 138, it necessarily follows that S. 16 can only be helpful to a plaintiff where he has not gone to the executing Court to obtain possession, and the time from which the period begins is the time when the sale becomes absolute; but where on the other hand the decree-holder as auction-purchaser has gone to the executing Court and obtained delivery of possession,

whether formal or actual, and he is then dispossessed either momentarily—where the possession is merely formal or later where the possession has been given to him actually,—a suit for recovery of possession by the plaintiff in such a case is not a suit by him as an auction-purchaser, but an ordinary suit for possession by the owner of the property whose title has become complete and effective by the confirmation of the sale and by the delivery of possession. In such a case Art. 144, Limitation Act, must apply.

Mr. P. R. Das attempted to distinguish the situation by holding that the decision in 26 C. W. N. 364¹ was erroneous and the attention of the learned Judges was not drawn to the case in 21 C. W. N. 304.² Mr. P. R. Das also drew our attention to the oral evidence in the case where it is stated by the defendant's witness that village Kosi Rukhi was in usufructuary lease of Dr. Abul Husan by a registered bond of the year 1913 and that he was in possession of the village, and also to the evidence of D. W. 3, Barho Singh, where he said that he paid rent of the year in which there was dakhaldhani to Yusuf Mia and after that he did not pay rent to any one. I do not see how these statements of the witnesses are at all relevant in the present case. Here it is found that there was a formal delivery of possession in 1924 and, therefore, the plaintiff must bring a suit within 12 years from the date when the possession of the defendants became adverse. That possession became adverse on the very date of the formal delivery of possession as has been consistently held in a number of cases including the case in 11 Pat. 165³ noticed above. Attention was also drawn by Mr. P. R. Das to the case in 5 Cal. 584,⁴ a decision approved by their Lordships of the Judicial Committee in 22 C. W. N. 330.⁵

In the former case it was held that delivery of possession by going through the process prescribed by the Civil Procedure Code was the only way in which the decree of the Court awarding possession to the plaintiff could be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, such delivery must, as against the defendant, be deemed equivalent to actual possession. As against third parties

4. ('80) 5 Cal. 584 (F.B.), Juggobundu Mukerjee v. Ram Chunder.

5. ('17) 4 A. I. R. 1917 P. C. 197 : 43 I. C. 268 : 22 C. W. N. 330 (P. C.), Radha Krishna Chanderji v. Ram Bahadur.

such symbolical possession is of no avail, because they are not parties to the proceedings. But if the defendant subsequently dispossesses the plaintiff by receiving the rent and profits the plaintiff will have twelve years from such dispossession to bring another suit. Mr. P. R. Das argued that as in this case the dispossession, on evidence of the defendants' witnesses already referred to, was by receiving rents and profits it should be held that the dispossession was not momentary on the date of formal delivery of possession but on some date later on. He, therefore, submitted that the case should be remanded to the Court below so that the parties may be allowed to give evidence to determine the exact date upon which the possession of the defendants became adverse by receiving rents and profits either from the lessee, Dr. Abul Husan, or from the tenants. In my opinion this position is not open to Mr. P. R. Das. Here I have found as a fact that there was a formal delivery of possession effected under the provisions of the Code of Civil Procedure in favour of Darbari Lal, the auction-purchaser, and that in the eye of law there must have been an immediate dispossession by the judgment-debtor. It is of no consequence that the dispossession was by the judgment-debtor through his lessee Dr. Abul Husan. Further the concluding portion of the judgment delivered by Garth C. J. at page 588 is very pertinent to the present controversy. Says the learned Chief Justice :

"One very conclusive test, as it seems to us, that the delivery thus effected under S. 224 does really, in the eye of the law, place the plaintiff in possession as against the defendant, consists in this ; that if mesne profits are awarded to the plaintiff, he is only entitled to them up to the time when delivery is given. This can only, of course, be explained upon the ground that, at that time, the defendant's possession is considered at an end, and the transfer to the plaintiff becomes complete."

This is exactly the view which I have taken while discussing the matter in the course of the judgment. As to the suggestion that the suit should now be remanded, the plaintiff cannot be allowed to make out a new case for the first time in appeal based upon some statements elicited from the defendants' witnesses in cross-examination. The case of the defendants always was that the plaintiff obtained delivery of possession formally through Court. The plaintiff had omitted to state anything about delivery of possession in the plaint and even after the written statement did not apply to have the plaint amended. The case must, therefore, be decided upon the materials as they

actually exist upon the record and it is not desirable to remand the case for further investigation. It must, therefore, be held that the suit of the plaintiff is barred by limitation, and the decision of the learned Subordinate Judge on this question was erroneous.

The learned Advocate-General also contended that the plaintiff had no right to maintain the suit after she had adopted a son as has been stated in paragraph 3 of the plaint. But no plea was taken in the written statement that the plaintiff has no right to maintain the suit. Mr. P. R. Das very rightly contended that if this plea had been taken it would have been easy for the plaintiff to have amended the plaint by including the minor son as a party to the action or by describing the plaintiff as suing both for herself and on behalf of her minor son. The judgment of the learned Subordinate Judge shows that at the time of the argument the guardian ad litem of the minor defendants pointed out that the plaintiff had no right to maintain the suit as the adopted son must inherit the properties and not the plaintiff. The learned Subordinate Judge overruled the contention holding that when Darbari Lal died there was no adopted son, and, therefore, the entire property vested in the plaintiff and by the subsequent adoption she could not be divested. Moreover in his opinion, according to the terms of the will, the plaintiff became the absolute owner of the properties left by Darbari Lal.

The learned Advocate-General raised an elaborate argument in appeal in which he vehemently contested the correctness of the view taken by the learned Subordinate Judge. He argued that now it was well settled by the decisions of their Lordships of the Judicial Committee in 60 I. A. 242⁶ and 70 I. A. 232⁷ that whenever an adoption is made it has the effect of vesting the property in the boy by relating back to the moment of the death of the father and divesting any person in whom the property has vested since the date of the death of the last owner. In my opinion it is unnecessary to consider this question at any length because we are conclusively bound by the decision of their Lordships pronounced in 54 I. A. 248.⁸

6. ('33) 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642 : 60 I. A. 242 : 143 I. C. 441 (P.C.), Amarendra Mansingh v. Sanatan Singh.

7. ('43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1944) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P.C.), Anant Bhikappa v. Shankar Ramchandra.

8. ('27) 14 A. I. R. 1927 P. C. 139 : 50 Mad. 508 : 54 I. A. 248 : 101 I. C. 779 (P.C.), Krishnamurthi Ayyar v. Krishnamurthi Ayyar.

Lord Dunedin in delivering the judgment of their Lordships after pointing out that it was impossible to reconcile all the decisions of the Indian Courts and still less the reasons on which they have been based, proceeded to examine the matter on principle.

At page 262 occur the following observations:

"When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place."

In my opinion, it is impossible for us to hold that these observations are not of general application when his Lordship expressly says that he is going to consider the question as a matter of principle. As Mr. Das had pointed out the other decisions of their Lordships of the Judicial Committee upon which reliance has been placed by the learned Advocate-General only deal with cases where the heir is divested and not of cases where an alienee is divested. Grave injustice will be done if after a son had been adopted many years after the death of the testator all alienations by the widow, assuming these are for legal necessity, could be ignored by the adopted son. Similarly, where the adopted son comes into being as the result of a will which gave the widow the power to adopt and the will itself has made a disposition of the property of the testator it will be incongruous to hold that the will is good in one part and bad as to the other part. For these reasons, I am in agreement with the decision of the learned Subordinate Judge on this point. But as the suit of the plaintiff is barred by limitation, I must allow the appeal, set aside the decision of the learned Subordinate Judge and dismiss the suit with regard to the property in appeal. In the circumstances I would direct each party to bear his own costs of this litigation here and in the Court below.

Das J. — I agree.

V.B.

Appeal allowed.

[*Case No. 85.*]

A. I. R. (33) 1946 Patna 207

FAZL ALI C. J. AND SINHA J.

Sajib Mian — Appellant

v.

Lango Uraon and another—Respondents.

Second Appeal No. 912 of 1943, Decided on 5th February 1945, from decision of Sub-Judge, Ranchi, D/- 24th May 1943.

Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 48—Pahan lands—Incidents of—Transferable before Tenancy Act came in force—Alienation of land by pahan — Suit to set aside — Limitation—Starting point—Each succeeding pahan does not get fresh cause of action — Limitation Act (1908), Art. 144.

Before the enactment of S. 48, Chota Nagpur Tenancy Act, in 1908, there was no bar to the transferability of pahan lands. [P 209 C 1]

Plaintiff, in his suit for possession in 1941, alleged that the lands in question were pahnai and mahtoi lands which belonged to the whole village community and were, therefore, inalienable; that plaintiff's deceased father, who was the former pahan of the village made some illegal alienations in 1892 and 1905 in favour of the defendant, and that plaintiff was the present pahan of the village. He sought possession of the lands on the allegation that defendant's possession was wrongful:

Held that the lands in question originally belonged to the village community and were made over to the family of the pahan as reward for services in the past as also as a remuneration for services in the future as village priest. Usually the eldest member of the family took upon himself the execution of the duty of the village pahan and remunerated himself and his family from the usufruct of the lands, and so long as the family continued to have some member ready and willing to do the duties of the village pahan, neither the community nor any member of it could interfere with the position of the pahan. In the absence of any election or nomination of each successive pahan, the property vested either in the family of the pahan or the village community as a whole. In either case, when the pahan for the time being alienated the pahan lands, there would be some person entitled to question the transaction of the transfer of the lands of such a tenure and hence each successive pahan did not get a fresh cause of action on his succession to the office. A suit for recovery of such lands alienated by the pahan brought more than 12 years after transfer would be barred by limitation. As the transaction in the present case took place more than 12 years before the institution of the suit it was barred by limitation. [P 209 C 2; P 210 C 1]

G. C. Mukherjee and L. K. Choudhury —

for Appellant.

R. K. Sahay — for Respondents.

Sinha J. — This is a defendant's second appeal against the decision of the learned Subordinate Judge of Ranchi, dated 24th May 1943, reversing that of the learned Munsif of the same place, dated 28th February 1942, in a suit in ejectment. The plaintiff's case was that he is the *pahan* of the village Malti where the lands in dispute lie; that the lands in question have been set apart by the village community for the performance of worship of spirits; and that the said lands are recorded in the record-of-rights as *bakasht* Bhuinhari Pahnai or *bakasht* Bhuinhari Mahtoi. According to the plaintiff's case, they are Pahnai and Mahtoi lands which belong to the whole village community, and are, therefore, inalienable to any extent. Chamru Uraon, the

plaintiff's father, was the former *pahan* of the village. He made certain illegal alienations in favour of defendant 1 and his brother, and the alienees gave a portion of the lands in *zerpeshgi* to defendant 2 by a registered deed, dated 4th February 1918. It is not said in the plaint when Chamru died. It has been only alleged that the plaintiff succeeded his grandfather as the *pahan* of the village, as the plaintiff's father had predeceased his own father. On the allegation that the defendants' possession is wrongful, the plaintiff seeks possession of the properties. The defence was that Chamru *pahan* had executed two registered *mukarrari* deeds, dated 3rd September 1892, and 17th January 1905, in favour of defendant 1 and his brother, now deceased, in respect of the disputed lands. Since then they have been in possession, and in 1918 they executed a *zerpeshgi* deed in favour of defendant 2 who has been in possession since the date of his *zerpeshgi* in respect of that portion of the disputed lands. The defendants further contended that the lands were transferable at the time the *mukarrari* deeds were executed, and they further denied that the lands were Pahnai or Mahtoi, and, therefore, inalienable.

The learned Munsif, who tried the suit in the first instance, came to the conclusion that the lands were the ancestral lands of the plaintiff's family, and had been entered in the revisional survey *khewat*, Ex. 1, as Bhuinhari Pahnai and Bhuinhari Mahtoi. In the *khatian*, there is a note that the defendants were in wrongful possession. The Munsif, therefore, took the view that the lands were the ancestral lands of the plaintiff, and that they did not belong to the entire village community, and, as the transfers in question made by the former *pahan* were made before 1st January 1908, when a statutory bar was created against the transfer of such lands, they were binding on the plaintiff being the successor-in-interest of the transferor. Alternatively, he found that, if they were inalienable by custom, as contended on behalf of the plaintiff, the transfers in question were void *ab initio*, and should have been questioned by the alienor himself. In that view of the matter, the trial Court came to the conclusion that the suit was barred by 12 years limitation. Thus, on the plaintiff's own case, the trial Court held that the suit was barred by limitation or, as the learned Munsif put it, the defendants had acquired a title by adverse possession for more than 12 years.

Against the decree of dismissal passed by the learned Munsif, the plaintiff brought an appeal which was heard by the learned Subordinate Judge. The lower appellate Court came to the conclusion that the plaintiff's case that the lands being Pahnai and Mahtoi, were inalienable and non-transferable is correct. That being so, according to the lower appellate Court, the plaintiff could challenge the transactions when he succeeded to the office of the *pahan*. However, the learned Subordinate Judge fell into the error of thinking that it was the admitted case of the parties that Chamru Uraon died within 12 years of the institution of the present suit, and, consequently, the bar of 12 years limitation did not apply to it. The learned Subordinate Judge also seems to have come to the finding that the lands were really the property of the village community and held by the *pahan* for the time being in lieu of services for the performance of certain special duties to the community, and, therefore, by custom inalienable. In the result, the learned Subordinate Judge decreed the suit and the appeal before him with costs in both the Courts. Hence this second appeal which was heard in the first instance by a single Judge of this Court who directed that the case be placed for hearing before a Division Bench, as it involved a substantial question of law which is not free from doubt and difficulty.

Mr. G. C. Mukherjee on behalf of the appellant has contended, in the first instance, that before 1st January 1908 such Bhuinhari lands were not inalienable by law. According to his contention, it was only by the provisions of S. 48, Chota Nagpur Tenancy Act, that such lands were declared to be inalienable. It was contended, on the other hand, on behalf of the plaintiff-respondents by Mr. R. K. Sahay that such tenures are mere service tenures which by local custom were inalienable. He has relied upon the statements contained in the Settlement Report of Ranchi District by Mr. Taylor to the effect that transfers of such tenures were treated as illegal and entered as such in the record-of-rights. But there is no categorical statement in that report that by the custom of the country, or by any peculiar custom attaching to these kinds of tenures, the *pahan* for the time being was not entitled to make any transfers; nor is there any allegation in the plaint that there was any such custom recognised by the Courts. On the other hand, there are indications in that Settlement Report itself that there used to be frequent

transfers of such tenures and that thousands of such transfers have been noted in the record-of-rights prepared during the revisional settlement proceedings. Hence, the position is that before 1st January 1908, there was no statutory bar to the transfer of such tenures; nor is there any averment in the plaint that there was any local custom of inalienability which could be recognised and given effect to by the Courts in dealing with such transfers. In my opinion, therefore, the learned Munsif appears to have taken the correct view of the legal position as regards the transferability of the tenures in question before the enactment referred to above. That being so, the transfers in question in this case, having been made before 1st January 1908, cannot be questioned by the plaintiff in a suit instituted in the year 1941.

But the trial Court did not record a clear and definite finding that such tenures as are in question in this case were transferable. On the other hand, the lower appellate Court has taken the view that by local custom such tenures are inalienable. On this finding, it would have been necessary to remand the case for a fresh decision on the question of limitation, if we were of the view that the conclusion of the learned Subordinate Judge that the plaintiff would have a fresh cause of action for bringing a suit on his own behalf on the death of the alienor is correct. The learned Subordinate Judge seems to have erroneously assumed that it was admitted by the defendants, or that it was their admitted case, that Chamru Uraon, who executed the *mukarrari* deeds in favour of defendant 1 and his brother died within twelve years of the suit. That was the case of the plaintiff; but the defendant's case, on the other hand, was that Chamru died more than twenty years before the institution of the suit. But, in the view we take of this case, it is not necessary to take that course.

If the conclusion of the learned Subordinate Judge that the lands in dispute belong to the village community, as alleged by the plaintiff, is correct, then certainly any member of the village community could have instituted the suit to challenge the alienation made by Chamru Uraon within twelve years of the transactions in question. But it was contended on behalf of the plaintiff-respondents by Mr. R. K. Sahay that the true position is that the land originally belonged to the village community and that it had been made over to the *pahan* for the time being as a remuneration for his services as such.

Therefore, he contended, each successive *pahan* will have a fresh cause of action on the death of his predecessor-in-office: in other words, according to his contention, the lands in dispute are vested in the *pahan* for the time being who renders service as village priest, and appropriates the usufruct of the lands for the time being as his remuneration. He contends further that one *pahan* does not claim title through his predecessor-in-office. If these contentions are correct, the plaintiff's suit is not barred by limitation. But that is not the case made out in the plaint. From the plaintiff's pleadings it would appear, as held in the Courts below, that the lands belong to the village community. It is nowhere stated in the plaint that the *pahan* is appointed by any method of election or nomination by the village community on the death or dismissal of the former *pahan*. Reliance was placed on behalf of the plaintiff-respondents on the decisions in 13 Mad. 277,¹ 59 Mad. 809 : 63 I. A. 261,² 23 Mad. 271³ and 21 P. L. T. 219.⁴ But, in my opinion, none of those cases apply to the facts and circumstances of the present case, inasmuch in those cases the transfers were not void *ab initio*; but in the present case it is the plaintiff's own case that the transfers in question were void *ab initio*. If the transfers were void *ab initio* the transferor himself, apart from others interested in the property, could have maintained the suit for declaring the alienation void.

In my opinion, the true position seems to be that the lands in question originally belonged to the village community. They were made over to the family of the *pahan*, who may have been one of the founders of the village, as reward for their services in the past as also as a remuneration for services to be rendered in the future as village priest. The property vests in the family of the *pahan*, one man of the family for the time being holding the position of the *pahan*, and, therefore, holding the lands as such. As already indicated, there is no allegation, nor any evidence on the record to show that each successive *pahan* is either

1. ('90) 13 Mad. 277, Mahomed v. Ganapati.

2. ('36) 23 A. I. R. 1936 P.C. 183 : 59 Mad. 809 : 63 I.A. 261 : 162 I.C. 465 (P.C.), Daivasikhamani Ponnambala Desikar v. Periyannam Chetti.

3. (1900) 23 Mad. 271 : 27 I. A. 69 : 7 Sar. 671 (P. C.), Gnanasambanda Pandara Sannadhi v. Velu Pandaram.

4. ('40) 27 A. I. R. 1940 Pat. 494 : 19 Pat. 507 : 187 I. C. 266 : 21 P. L. T. 219, Maksudan Lal v. Niranjana Nath.

elected or nominated by the village community. It appears that some member of the family, usually the eldest member, takes upon himself the execution of the duty of the village *pahan*, and remunerates himself and his family by the usufruct of the lands; but no person outside the family can claim to be the village *pahan*. So long as the family continues to have some member ready and willing to perform the duties of village *pahan*, neither the village community as such, nor any member of the community, can interfere with the position of the *pahan*. Hence, in the absence of any election or nomination of each successive *pahan*, the property would vest either in the family of the *pahan* or in the village community as a whole. In either view of the case, apart from the alienor himself, there will be some other person entitled to question the transaction of transfer of lands of such a tenure. Hence in the present case, Chamru Uraon himself, or, failing him, his son during the latter's lifetime, or any other member of the village community, could have instituted a suit to declare the transfers void. Hence, it follows that the plaintiff had no fresh cause of action when he succeeded to the position of the *pahan* on his grandfather's death, whenever it may have taken place. As the transactions in this case apparently took place more than 12 years before the institution of the suit, and in one case even more than 12 years before the coming into effect of the amended S. 48, Chota Nagpur Tenancy Act, 1908, the suit is hopelessly barred by time. This conclusion is supported by the observations of their Lordships of the Madras High Court in A. I. R. 1941 Mad. 217⁵ where in similar circumstances their Lordships held that each successive holder of the office does not get a fresh period of limitation for instituting a suit for a declaration of the kind prayed for in the present case. As a result of these considerations, it must be held that the judgment of the learned Munsif was more correct. The appeal is accordingly allowed, the judgment and decree of the lower appellate Court set aside, and those of the trial Court restored. But, in the circumstances of the case, I would direct that each party should bear its own costs throughout.

Fazl Ali C. J.— I agree.

G.B./D.H.

Appeal allowed.

5. ('41) 28 A. I. R. 1941 Mad. 217, Adinarayana Chetty v. Appan Srirangachariar.

[Case No. 86.]

A. I. R. (33) 1946 Patna 210
MANOHAR LALL AND DAS JJ.
Mathura Prasad and another
Petitioners

v.

Emperor.

Criminal Revn. Nos. 675 and 676 of 1945, Decided on 22nd August 1945, from order of Sessions Judge, Purulia, D/- 3rd April 1945.

(a) Evidence Act (1872), Ss. 24, 25, 26 and 27—S. 27 is a proviso not only to S. 26 but also to Ss. 24 and 25.

Section 27 is a proviso not only to S. 26 but also to Ss. 24 and 25. Accordingly, if a confession comes within the purview of S. 27 as leading to the discovery of certain facts it would be admissible in evidence even if it is hit by S. 24 as having been caused by inducement, threat or promise : 6 All. 509 (F. B.) ; 31 All. 592 (F. B.) ; ('18) 5 A.I.R. 1918 Cal. 88 and ('32) 19 A.I.R. 1932 Cal. 297; *Rel. on* ; ('39) 26 A.I.R. 1939 P.C. 47, *Expl.* [P 212 C 2]

(b) Evidence Act (1872), S. 27—Accused not in custody of police officer when making confession—S. 27 does not apply.

Section 27 refers to the statement of a person accused of any offence and in the custody of a Police Officer. If the accused was not in the custody of a Police Officer at the time when he made the confession Section 27 cannot apply : ('32) 19 A. I. R. 1932 Cal. 297, *Rel. on.* [P 212 C 2]

(c) Penal Code (1860), Ss. 406 and 408—Offence under — Essentials of — B manager of A's shop misappropriating money of shop and ornaments pledged with him by faking up dacoity—Money subsequently recovered from places pointed out by B — B held guilty of criminal breach of trust.

A the proprietor of a liquor shop appointed B as the manager of his shop. The iron safe in the shop contained cash of the shop and certain ornaments pledged with B by C. B faked up a dacoity and gave false information to the police that the cash and ornaments in the safe of the shop had been removed by dacoits. The fact was that the cash and ornaments were appropriated by B and hidden at various places from which they were recovered, subsequently on information given by B:

Held, (1) (Per Das and Manohar Lall JJ.)—B was guilty of criminal breach of trust with regard to the cash and was rightly convicted under S. 408 as his intention was to dishonestly misappropriate the same by staging a faked dacoity. It was the dishonest intention which was essential for the commission of the offence of criminal breach of trust. Whether wrongful gain or loss actually resulted was immaterial. It was a consequence but not essential part of the offence. There might be appropriation by a mental act without any actual expenditure of the money appropriated though the mental appropriation must be established by some overt and visible act but the actual expenditure of the money was not the only proof of it. [P 213 C 1]

(2) (Per Das J.)—As B wanted to appropriate the ornaments by setting up a false dacoity he was guilty under S. 406 in respect of the ornaments. [P 213 C 2]

Per *Manohar Lall J.*—It was doubtful whether B could be convicted under S. 406 in respect of the ornaments in the absence of evidence, as to the person on whom the damage or loss would fall if the pawned articles were stolen by some thieves or dacoits. [P 214 C 1]

Penal Code—

(45) Ratanlal, P. 978, Pts. 5, 6, P. 983, Note "Pledge."

(36) Gour, P. 1374, Pt. 8; P. 1366, Notes 4788 and 4789.

S. N. Sahay and S. K. Mazumdar —
for Petitioners.

Assistant Government Advocate —
for the Crown.

Das J. — These are two applications in revision, which have been heard together. The two petitioners are Mathura Prasad and Muhammad Rafique. Mathura Prasad has been found guilty under ss. 406 and 408, Penal Code, and he has been sentenced to rigorous imprisonment for two years under each of the two sections mentioned above. The order is that the two sentences of imprisonment shall run concurrently. Rafique has been found guilty under S. 411, Penal Code, and under ss. 406 and 408 read with S. 114, Penal Code. He has been sentenced to rigorous imprisonment for one year under each of the three sections mentioned above. In his case also, the order is that the sentences shall run concurrently.

The case against these two petitioners was the following. One Rai Sahib Baldeo Sao, a resident of the district of Ranchi, is the proprietor of several liquor shops in the district of Manbhum and other districts. We are concerned in this case, with two of the liquor shops, one known as Sarbari liquor shop and the other known as Narayanpur liquor shop. The Sarbari liquor shop is stated to be about half a mile from village Nauria. Narayanpur liquor shop is about two miles from the Sarbari liquor shop. Mathura Prasad was the manager of the Sarbari liquor shop, and one Chandradeo (who was also accused, but was acquitted) was the manager of the Narayanpur liquor shop. Rafique was a peon of the Narayanpur liquor shop. The prosecution case is that on 5th January 1944, at about 2-30 A. M., one Ganesh Ram, a peon of the Sarbari liquor shop lodged an information at Nauria Police Station to the effect that there had been a dacoity in the liquor shop at Sarbari. This information was lodged by Ganesh Ram at the instance of the petitioner Mathura Prasad. It was alleged, in the first information, that 15 to 20 Punjabis had entered the room where the petitioner Mathura Prasad was sleeping, and that the dacoits had tied up Mathura Prasad

by means of a rope and had taken away the key from him; the dacoits then opened the iron safe, and took away the properties mentioned in Ex. 6. The properties consisted of Rs. 18,566-5-6, and a gold chain and a gold *churi*, alleged to have been pawned by one Sadilal, and also a silver necklet. The proprietor of the shop, Rai Sahib Baldeo Sao, was away at Ranchi at the time. He came to know of this dacoity at Ranchi on 6th January 1944, and he arrived at Sarbari liquor shop on 7th January 1944, in the afternoon. It appears that he was not satisfied that a real dacoity had been committed, and he suspected that there was some foul play by his employees in this matter. From 7th January 1944 to 9th January 1944, nothing in particular seems to have happened; but at 11 P. M. on 9th January 1944, Mathura Prasad and one Bindeswari (Bindeswari was stated to be the general manager of all the liquor shops and was one of the accused who has been acquitted on appeal by the learned Sessions Judge) are stated to have confessed their guilt. I am not referring in detail to the confessional statement, inasmuch as it has been held to be inadmissible in evidence by the learned Sessions Judge. Mathura Prasad and Bindeswari then took Rai Shaib Baldeo Sao to a ditch, about 200 steps north-west of the liquor shop. The prosecution case is that this was in the presence of Sadilal and Hardayal. Mathura Prasad took out a bundle from under the grass in the ditch, and it was found to contain Rs. 15,048 in Government currency notes, one gold chain, one gold *churi* as well as three gold guineas. Sadilal, who was present at the time, identified the gold chain and *churi* as those belonging to him, which he had pawned with the petitioner Mathura Prasad. As the cash recovered still fell short of the total amount which was alleged to have been removed by the dacoits, Rai Sahib was anxious to know where the balance of the cash was. On certain further information given by Mathura Prasad and Bindeswari, the Rai Shaib proceeded to the other liquor shop at Narayanpur in his car. He was accompanied by Mathura Prasad, Bindeswari and three other employees of his. At Narayanpur, the Rai Sahib met Chandradeo and two other persons, called Moti and Ramjan. It appears that on certain information given by Chandradeo, the party proceeded to a village called Saltore, which is half a mile from Narayanpur. Rafique resided in this village. The party went to the house of Rafique. Rafique took the party

to a river bed, about $\frac{1}{4}$ th of a mile from Saltore, and there a packet was recovered from under the dried-up river bed, and on opening the packet, currency notes of the value of Rs. 2364 were found. The cash so far recovered still fell short of the total amount by about Rs. 600, and this amount was subsequently produced on the next day by another of the accused persons, who had been acquitted by the learned Magistrate. Rafique is stated to have made some confessional statement to the Rai Sahib after the recovery of the cash from the river bed.

The prosecution case, therefore, is that Mathura Prasad had given information of a faked dacoity in which Rafique had also taken part. As a result of this faked dacoity, Mathura Prasad had committed criminal breach of trust, as a servant of the liquor shop, in respect of the cash amount kept in the liquor shop, and that he had committed criminal breach of trust in respect of the gold chain and *churi* pawned by Sadilal. This explains the two charges against Mathura Prasad under ss. 408 and 406, Penal Code. As against Rafique, the case is that he had abetted Mathura Prasad in the faked dacoity and he was also in dishonest possession of part of the stolen cash. This explains the charge of abetment (*sic* and ?) the charge under s. 411, Penal Code, against Rafique. It would be convenient to take up the cases of the petitioners separately. I take up the case of Mathura Prasad first. On behalf of Mathura Prasad, the following points have been urged. It has been contended that excluding the confession which has been found to be inadmissible, the other evidence in the record does not support the conviction of Mathura Prasad for offences under ss. 406 and 408, Penal Code. As to the confession, it appears that both the Courts below have come to the finding that the confession was the result of an inducement or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient to give the accused person grounds for supposing that by making the confession he would gain an advantage, etc., and was, therefore, hit by s. 24, Evidence Act. The learned trying Magistrate, however, held that the confession was admissible under s. 27, Evidence Act, inasmuch as it led to a discovery of the bundle in the ditch containing cash and ornaments. The learned Sessions Judge, however, has held that the confession is not admissible, inasmuch as s. 24 contains an absolute bar against the admission of a con-

fession caused by inducement, threat or promise.

In my opinion, the learned Sessions Judge is right in holding that the confession is not admissible in evidence, though not exactly for the reason given by him. It has been held in several cases that s. 27 is one of those sections which controls the three earlier sections, namely ss. 24, 25 and 26. If, therefore, a confession comes within the purview of s. 27, it would be admissible in evidence, even if it is hit by s. 24 of the Act: *vide* 6 ALL. 509;¹ 31 ALL. 592;² 45 Cal. 557³ and 36 C. W. N. 373.⁴ In A. I. R. 1939 P. C. 47⁵ their Lordships of the Judicial Committee no doubt have made an observation to the effect that s. 27 seems to be intended to be a proviso to s. 26, etc. Their Lordships took the precaution, however, of stating that they were expressing no opinion on this topic, and they merely held that s. 162, Criminal P. C., should be given its full meaning. Their Lordships did not, therefore, decide the question if s. 27, Evidence Act, is a proviso to s. 26 only or to the three preceding sections, namely ss. 24, 25 and 26, Evidence Act. The conflict between s. 27, Evidence Act, and s. 162, Criminal P. C., if any, has now been resolved by Act 15 [XV] of 1941 by which it has been clearly provided that s. 162, Criminal P. C., will not affect the provisions of s. 27, Evidence Act. The position, therefore, still remains as laid down in the cases cited above, namely that s. 27, Evidence Act, is not merely a proviso to s. 26 of the Act, but also to the two preceding sections namely, ss. 24 and 25 of the Act. The difficulty, however, is that the confession in question does not come within the terms of s. 27, Evidence Act. Section 27, Evidence Act, refers to the statement of a person accused of any offence and in the custody of a police officer. Mathura Prasad was not in the custody of a police officer at the time when he is stated to have made the confession. Section 27 does not, therefore, apply. This no doubt results in an anomalous position, to which attention was drawn by

1. ('84) 6 All. 509 (F. B.), *Queen-Empress v. Babu Lal*.
2. ('09) 31 All. 592; 3 I. C. 26 (F. B.), *Emperor v. Misri*.
3. ('18) 5 A. I. R. 1918 Cal. 88 : 45 Cal. 557; 44 I. C. 321, *Amiruddin Ahmed v. Emperor*.
4. ('32) 19 A. I. R. 1932 Cal. 297 : 59 Cal. 1040 : 138 I. C. 116 : 36 C. W. N. 373, *Durlav Nama-sudra v. Emperor*.
5. ('39) 26 A. I. R. 1939 P. C. 47; 18 Pat. 234 : 1941 Rang. L. R. 789 : I. L. R. (1939) Kar. 123 : 66 I. A. 66 : 180 I. C. 1 (P. C.), *Pakala Narayana Swami v. Emperor*.

Rankin C. J., (as he then was), in 36 C. W. N. 373.⁴ I am, therefore, of the view that the learned Sessions Judge was right in holding that the confessional statement of Mathura Prasad was not admissible in evidence.

The question, therefore, is if Mathura Prasad can be found guilty of the offences under ss. 406 and 408, Penal Code, in case the confessional statement is excluded. Both the Courts below have come to the finding that the so-called dacoity, of which Mathura Prasad gave information through Ganesh Ram, was really a faked dacoity, and that no dacoity had actually taken place. The Courts below have given very good reasons for this finding. The evidence given in the case has been placed before us, and I see no reasons to go behind the finding of fact arrived at by the Courts below. Mathura Prasad had faked up a dacoity, and had then taken the proprietor of the shop to a ditch 200 paces north-west of the shop, and brought out a bundle containing cash and ornaments. A minor discrepancy as to whether the place from which the bundle was brought out was dug out or not, does not, in my opinion, affect the main question. Mathura Prasad was the manager of the liquor shop, and it is clear that his intention was to dishonestly misappropriate the cash and the ornaments by staging a faked dacoity. The offence of criminal breach of trust is completed by the misappropriation of the properties dishonestly.

It is the intention which is essential; whether wrongful gain or loss actually results is immaterial; it is a consequence, but not essential part, of the offence, and a person is not accused of the offence by reason of it. There may be appropriation by a mental act without any actual expenditure of the money appropriated, though the mental appropriation must be established by some overt and visible act; but actual expenditure of the money is not the only proof of it. In the particular case under our consideration, Mathura Prasad dishonestly misappropriated the cash and the ornaments by staging a faked dacoity in which he alleged that the cash and the ornaments have been stolen by dacoits. The evidence of Sadilal (P. W. 1) has an important bearing on this point. After Sadilal had come to know of the dacoity, he went to Mathura Prasad to enquire about the gold *churi* and chain which he had pawned with Mathura Prasad. Sadilal then says as follows:

"Mathura Prasad told me that a dacoity had been committed in the Bhatti and everything including my ornaments had been taken by the dacoits."

This shows what the intention of Mathura Prasad was. As to the cash, our attention was pointedly drawn to the discrepancies between Ex. 6 and Ex. 2. Exhibit 6 is the list of articles stated to have been stolen by the dacoits and Ex. 2 is the list of articles which were found in the bundle recovered from the ditch. It appears that there are several discrepancies with regard to the number and denomination of the notes. These discrepancies have been referred to by the learned Sessions Judge, and he has come to the finding that the prosecution has not been able to explain these discrepancies. He has therefore found that the only things, which connect the articles recovered with the alleged dacoity, are the gold chain and *churi* pawned by Sadilal. The charge under s. 408, Penal Code, related to the cash and the charge under s. 406, Penal Code, related to the gold chain and *churi*. It has been contended before us that Mathura Prasad did not tell Sadilal that he would not return the pawned articles, and, therefore, Mathura Prasad committed no breach of trust in respect of the gold chain and *churi*. I have already stated that misappropriation may be by a mental act shown by some overt and visible action. It is obvious that Mathura Prasad wanted to appropriate the cash and the ornaments by setting up a false plea of dacoity. As to the discrepancies between Ex. 2 and Ex. 6, I am of the opinion that they do not affect the main question. The cash recovered from the bundle was undoubtedly the cash of the liquor shop. It is nobody's case that the cash recovered from the bundle in the ditch was the private cash of Mathura Prasad. Obviously, Mathura Prasad did not give the correct number and denominations of the notes in Ex. 6. His main idea was to misappropriate the cash of the liquor shop by staging a faked dacoity. I am, therefore, unable to hold that the discrepancies between Ex. 2 and Ex. 6 make any difference to the offences committed by Mathura Prasad.

In my opinion, Mathura Prasad has been rightly found guilty of the offence under s. 408, Penal Code, in respect of the cash and under s. 406, Penal Code, in respect of the gold chain and *churi*.

I now take up the case of Rafique. At first, I was inclined to think that Rafique cannot be found guilty of abetment. I have carefully gone through the evidence in the record, and I find that Rafique had confessed to having joined in the faked dacoity for the purpose of removing the cash and the

ornaments from the liquor shop at Sarbari. The confession of Rafique is not hit by S. 24, Evidence Act, and is clearly admissible in evidence. It has been pointed out to us that the evidence of the Rai Sahib shows that Rafique and two other persons made the confession and it has been contended that in the absence of any evidence showing which particular person had made the confession, it would not be admissible in evidence. I have carefully examined the evidence of Rai Sahib Baldeo Sao, and it appears from his evidence that it was Rafique who made the confession first. Subsequently, he was supported by Ramjan, Moti and Chandradeo. It was Rafique, who took the party to the river bed from which the packet containing Rs. 2364 was recovered. Our attention has been drawn to the evidence of Rai Sahib Baldeo Sao in which he states that Rafique, Ramjan and Moti began to remove the sand; then the packet was found. There can, however, be no doubt that Rafique was also in possession of the packet along with two other employees. It was Rafique who took the party to the river bed. Unless Rafique was in the full know of things, he could not have taken the party to the place where the packet was. The mere fact that two other persons removed the sand before the packet was found, does not show that Rafique had no guilty knowledge.

I am, therefore, satisfied that Rafique was an abettor in the sense that he had conspired with other persons in taking part in the faked up dacoity for the removal of the cash and the ornaments; he is also guilty of dishonestly retaining part of the cash with a guilty knowledge.

For these reasons, I think that both the petitioners have been rightly convicted, and there are no grounds for interference either with the convictions or with the sentences. The result, therefore, is that the applications fail and are dismissed.

Criminal Revision No. 675 of 1945.

Manohar Lall J. — I feel doubtful as to the correctness of the conviction of petitioner Mathura Prasad under S. 406, Penal Code, inasmuch as no evidence has been led as to the person on whom the damage or loss would fall if the pawned articles were stolen by some thieves or dacoits. But as the sentence under S. 406, Penal Code, is concurrent with the sentence under S. 408, Penal Code, the petitioner will get no relief. It is, therefore, undesirable for me to differ from my learned brother.

Criminal Revision No. 676 of 1945.

In this case I am doubtful as to the correctness of the conviction for abetment of dacoity because I am not satisfied that it is sage to act upon the confession which is said to have been made by the petitioner Rafique after the discovery of the stolen property. But I am in agreement with my learned brother as to the correctness of the conviction under S. 411, Penal Code. The sentences imposed under both the sections being concurrent, the petitioner would get no relief. For this reason it is undesirable for me to differ from my learned brother.

G.N./D.H. *Applications dismissed.*

[*Case No. 87.*]

A. I. R. (33) 1946 Patna 214

MANOHAR LALL AND DAS JJ.

Jatru Pahan and another—Appellants
v.

Ambikajit Prasad — Respondent.

Appeal No. 73 of 1945, Decided on 20th September 1945, from appellate order of Judicial Commissioner, Chota Nagpur, Ranchi, D/- 8th December 1944.

Civil P. C. (1908), S. 47—Execution of mortgage decree directing sale of specific property—Objection by legal representatives of judgment-debtor on ground that mortgagor had no right to transfer property originally or had no longer interest therein since date of decree — Objection cannot be allowed.

The Court executing a mortgage decree which directs the sale of a specific property, cannot allow the judgment-debtor or his legal representatives to object that such a decree is not capable of execution either because the judgment-debtor had no right originally to execute the mortgage bond upon the basis of which the decree has been passed, or that since the date of the mortgage decree owing to the death of the judgment-debtor or otherwise, the judgment-debtor had no longer any interest in the property : ('25) 12 A.I.R. 1925 Pat. 625; ('40) 27 A. I. R. 1940 Rang. 161 and 19 All. 480, *Rel. on* ; 17 Cal. 711 (F.B.), *Disting.*

[P 215 C 1, 2]

C. P. C. —

('44) Chitale, S. 47, N. 46, Pt. 5; N. 29 Pt. 1; S. 38, N. 8, Pt. 13.

('41) Mulla, S. 47, P. 188, Pt. (s), S. 38, P. 164, Pt. (w).

G. C. Mukherji and L. K. Chaudhury —

for Appellants.

B. C. De, R. K. Sahay and A. K. Chatterji —
for Respondent.

Manohar Lall J. — This is an appeal by the decree-holder against an order passed by the learned Judicial Commissioner of Ranchi by which he, in appeal, has reversed the decision of the learned Munsif and has held that the opposite party, respondent here, is entitled to take objection to the validity of the decree in the circum-

stances about to be stated. The decree-holder obtained a mortgage decree against one Bikramajit Prasad. At the time of the execution of that decree Bikramajit Prasad was dead and Ambicajit Prasad and some others were substituted as legal representatives of the deceased judgment-debtor. Ambicajit Prasad took objection under S. 47, Civil P. C., that either the interest of the judgment-debtor had ceased by his death, or that the judgment-debtor had no right whatsoever to execute the mortgage bond on the basis of which the mortgage decree under execution had been passed.

The learned Munsif had no difficulty in disposing of these objections as being untenable. He pointed out that the objection that the mortgagor had no right to alienate or to mortgage the property should have been raised in the original suit itself and since the decree was final, the executing Court cannot go behind the decree. He then goes on that if there was a stipulation in the partition-deed that Bikramajit Prasad was absolutely restrained from alienating the property, such a condition was void under S. 10, T. P. Act. Against this decision there was an appeal which was disposed of by the learned Judicial Commissioner, who, while discussing the matter under point No. 1 whether the application could come under S. 47, Civil P. C., or whether a separate suit should be instituted, observed that he could not understand any point "in the attempt on the part of the decree-holder to put off consideration of the question simply by saying that there should be a fresh suit. The question for decision will be the same, what exactly Bikramajit Prasad could mortgage, and whether the condition was void under S. 10, T. P. Act, and whether after his death the decree has any force against the property." Accordingly, he overruled the decision of the learned Munsif and held that the judgment-debtor had no right whatsoever to transfer the property by way of mortgage and the mortgage decree could not be executed against the objector. Hence, this second appeal to this Court.

It is now settled by a number of decisions that in the circumstances like the present, the Court executing a mortgage decree which directs the sale of a specific property cannot allow the judgment-debtor or his legal representatives to object that such a decree is not now capable of execution either because the judgment-debtor has no right originally to execute the mortgage bond upon the basis of which the decree has

been passed or that since the date of the mortgage decree owing to the death of the judgment-debtor or otherwise the judgment-debtor had no longer any interest in the property. The matter has been put very clearly in the judgment of Das J. in 4 Pat. 510¹ at pp. 530, 531 and 532. The learned Judge referred to a number of authorities of the other High Courts which completely supported him in that conclusion. That view was approved by the learned Chief Justice to whom owing to the difference of opinion on other points, the appeal was referred for a decision. At pp. 600 and 601 the learned Chief Justice says:

"As pointed out by Das J. the application made by them to set aside the sale on the ground of irregularity under S. 311 of the old Code, although purporting to be an application under S. 344 also, did not in fact raise any question coming under the latter section and did not cover the point now raised. In my opinion, it was not open to the appellants to raise the question in those proceedings. The executing Court is bound to execute the decree and could not, apart from fraud, consider whether the decree ordering sale of the property was one which the trial Court ought rightly to have passed. The representatives of the mortgagor could not successfully reopen the question which, if it were open at all, should have been urged before the trial Court."

Mr. B. C. De appearing on behalf of the respondent sought to draw a distinction by relying on the case in 17 Cal. 711² and the cases which follow this Full Bench case, but that Full Bench case and the cases which follow that case deal with execution of a money decree and not of a mortgage decree. It was argued that the principle which should be applied is exactly the same whether the decree is a mortgage decree or a money decree. I do not agree with this contention because it would be easily noticed that in one case the decree is not a decree which directs the sale of any specific property and the decree-holder has to execute it by attaching same property. When he attaches the property the person who claims to be the owner of the property on the date of the attachment can come forward and say that this is not attachable in execution of a decree which has not been passed against him. But in the other case the decree itself directs the sale of the specific property and in such a case there is no attachment. In the circumstances, the judgment-debtor or his legal representative cannot be heard to say that the decree which

1. (25) 12 A.I.R. 1925 Pat. 625 : 4 Pat. 510 : 88 I. C. 141, *Hitendra Singh v. Rameswar Singh Bahadur*.
2. (90) 17 Cal. 711 (F.B.), *Punchanun Bundo-padhya v. Rabia Bibi*.

directs the sale of the property should not be put into execution because on account of certain circumstances either the judgment-debtor had no interest at the date of the mortgage, or his interest has ceased since the date of the mortgage decree. In a recent case in A.I.R. 1940 Rang. 161³ the same view has been taken and the cases relied upon by Das J. in 4 Pat. 510¹ have been noticed with approval. At the end of p. 162 an observation of the Allahabad High Court in 19 ALL. 480⁴ was quoted with approval:

"Where, however, the decree is a decree for sale under the Transfer of Property Act, (now replaced by O. 34, Civil P. C.), the Court executing the decree must sell the property decreed to be sold and leave anyone objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser."

This is the correct view of law. In my opinion, the learned Judicial Commissioner was wrong in reversing the decision of the learned Munsif. It was suggested by Mr. De that the present application on behalf of the respondent should be treated as if it was a plaint in a suit as provided by S. 47, sub-s. (2), Civil P. C. But considering all the circumstances, it is desirable that the matter should be agitated in a fresh suit if the aggrieved party is so advised. The result is that the appeal must be allowed, the decision of the learned Judicial Commissioner set aside and the decision of the learned Munsif restored. The objection under S. 47 must be dismissed. The appellant is entitled to his costs throughout. Mr. De desires it to be noted that his client does not claim this property as an heir of the judgment-debtor but claims in his independent right the property sought to be sold in execution of the mortgage decree. The other side does not accept this statement as correct.

Das J. — I agree.

V.W./D.H.

Appeal allowed.

3. ('40) 27 A. I. R. 1940 Rang. 161 : 1940 Rang. L. R. 402 : 190 I. C. 31, Ramaswamy Chettyar v. U Tun Tha.
4. ('97) 19 All. 480, Sanwal Das v. Bismillah Begam.

[Case No. 88.]

A. I. R. (33) 1946 Patna 216

MEREDITH J.

Sheonandan Pandey — Appellant
v.

Mt. Asarfi Kuer — Respondent.

Appeal No. 394 of 1944, Decided on 27th August 1945, from appellate order of Sub-Judge, 2nd Addl. Court, Arrah, D-/ 31st August 1944.

(a) Maintenance—Decree for future maintenance — Decree becomes executable on each default without further suit.

A decree for future maintenance is executable on each default and no further suit is necessary for its execution: 19 Cal. 139, *Rel. on.* [P 217 C 1]

C. P. C. —

('44) Chitaley, O. 21, R. 17, N. 8.

(b) Civil P. C. (1908), O. 34, Rr. 14 and 15—Applicability—'Claims arising under mortgage'—Meaning of, explained — Charge created by decree itself—Order 34, R. 14 does not apply—T. P. Act (1882), S. 100.

The prohibition under O. 34, R. 14 applies only to claims arising under the mortgage. Where a decree for future maintenance provides that maintenance will be a first charge upon certain specified properties the claim does not arise under any mortgage or charge but arises under the decree itself; the charge is provided by the decree itself only as an additional safeguard for the decree-holder in securing its enforcement. It would be grossly anomalous and unfair to hold that the provision put into the decree as an additional safeguard for the decree-holder would prevent her from executing her decree at all as she would otherwise have done. Order 34, Rule 14, Civil P. C., read with S. 100, T. P. Act, would not apply to such a case. [P 217 C 1]

C. P. C. —

('44) Chitaley, O. 34, R. 14, N. 3.

(c) Civil P. C. (1908), S. 100—Mixed question of law and fact based on interpretation of decree — Question cannot be raised for first time in second appeal.

The question whether a decree for future maintenance creating the maintenance a first charge upon certain specified properties is capable of being executed is a mixed question of law and fact based on the interpretation of the decree, and cannot be raised for the first time in second appeal. [P 218 C 1]

C. P. C. —

('44) Chitaley, S. 100, N. 28, Pt. 11.

A. B. N. Sinha — for Appellant.

B. P. Varma — for Respondent.

Judgment. — This is a miscellaneous second appeal by the judgment-debtor. The decree under execution is a compromise decree for future maintenance under the terms of which the decree-holder was to get 25 maunds of rice every year from 1351 during Pous. For the first year, however, it was provided that the decree-holder would get seven maunds of rice on 20th June 1943, and the remaining 18 maunds in Pous. 1351. The judgment-debtor failed to give the seven maunds of rice by 20th June, and the decree-holder thereupon filed the present application for execution and realisation of the cash value of seven maunds of rice.

The judgment-debtor made an objection under S. 47, Civil P. C., and raised only one point, namely, that execution was premature as the decree-holder should have waited until Pous. This objection was rejected by the

learned Munsif. In appeal this again was the only point taken before the learned Subordinate Judge, and he also rejected it. In second appeal, this point has not been pressed. Obviously it could not be pressed, since there was a clear default by the 20th June according to the terms of the decree and upon that default the decree-holder was entitled to execute her decree for the amount in default.

It has been attempted, however, to raise a new point in second appeal for the first time. The point is that execution is not maintainable, as upon the terms of the decree a fresh suit would be necessary and an application for execution would not lie. It has, however, been well settled for long that a decree for future maintenance is executable upon each default. I need only refer to the Full Bench case in *Ashutosh Banerjee v. Lukhimoni Debya* (19 Cal. 139),¹ wherein it was laid down that future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit. Their Lordships in that case quoted certain observations of Westropp C. J., who had said :

"It is not desirable that there should be several suits in respect of the maintenance of one widow. The system of seeking or granting relief piecemeal, subjects both plaintiff and defendant to much unnecessary expense and trouble, and is only advantageous to the legal profession; such a course ought to be discontinued so far as may legitimately be done by the civil Court," —

observations the force of which must appeal to every fair-minded person.

It is argued, however, that in the decree before us there is no specific provision that the property can be sold in execution in the event of default. All that the decree says is that the maintenance will be a first charge upon certain specified properties. A decree in these terms, it is contended, can only be enforced, by a fresh suit to enforce the charge. As far as I can ascertain from the reported decision, the decree under consideration in 19 Cal. 139¹ was in the same terms as the present decree, and merely provided that the judgment-debtor do pay so much upon such and such successive dates and created a charge upon certain property for the purpose. Reliance is, however, placed on the following rulings: *Aubhoyessury Dabee v. Gouri Sunkur Panday*, (22 Cal. 859),² *Matangini Dassee v. Chooneymoni Dassee*, (22 Cal. 903),³ *Hem*

Ban v. Bihari Gir, (28 ALL. 58)⁴ and *Rameshar Upadhya v. Subhkaran Upadhya*, (8 A. L. J. 418).⁵ 22 Cal. 859² and also 28 ALL. 58⁴ were based upon the prohibition contained in S. 99, T. P. Act, long repealed and now replaced by O. 34, R. 14, Civil P. C. There has been a very significant change in the wording of this prohibition, a change which makes all the difference in a case like the present. Section 99 was in the following terms:

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the decree (*sic*, mortgage) or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67."

In O. 34, R. 14 the words "or not" were omitted, and it runs:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such a suit notwithstanding anything contained in O. 2, R. 2." Thus, while S. 99 applied to claims arising either under the mortgage or not, the prohibition under O. 34, R. 14 applies only to claims arising under the mortgage. No doubt, under S. 100, T. P. Act, all the provisions of the Act which apply to a simple mortgage shall, so far as may be, apply to a charge created either by act of the parties or operation of law; but in the present case the claim does not arise under any mortgage or charge. It arises under the decree itself, and the charge was provided by the decree itself only as an additional safeguard for the lady in securing its enforcement. It would be grossly anomalous and unfair to hold that the provision put into the decree as an additional safeguard for the lady would prevent her from executing her decree at all as she should otherwise have done. In the view I take, O. 34, R. 14 leads to no such result.

As for 8 A. L. J. 418⁵ and 28 ALL. 58⁴ these were special cases of decrees in peculiar terms. In 28 ALL. 58⁴ the parties arrived at a compromise, which was embodied in a document setting out that certain properties should be charged for maintenance. A suit was brought to enforce the terms of that document, and it was quite rightly held by Knox J. that such a suit was maintainable. There it was a question not of enforcing any decree but of enforcing the document executed by the parties as a result of their compromise. In 8 A. L. J. 418⁵ the point was that there was

4. ('06) 28 All. 58.

5. ('11) 10 I. C. 481 : 8 A. L. J. 418.

1. ('92) 19 Cal. 139 (F.B.).

2. ('95) 22 Cal. 859.

3. ('95) 22 Cal. 903.

nothing in the decree to indicate that the parties agreed that if the money were not paid in time the property should be sold. In the present decree for future maintenance, as in the decree in 19 Cal. 139¹ the intention of the decree, whatever its wording, was sufficiently clear, namely, that it was intended that in the event of default the decree-holder could enforce the decree by execution. The decree-holder is not now seeking specifically to enforce the charge, but seeking in general terms to execute the decree. I can see no reason why she should not do so, and were I forced to hold otherwise I should have done so with the greatest reluctance, having regard to the observations in 19 Cal. 139¹ which I have quoted and which I respectfully endorse.

Finally, having regard to the fact that this point has been taken for the first time in second appeal and it is a mixed question of law and fact since it is based on the interpretation of the decree the terms of which in that regard have not been considered by the Courts below, I should in any case have felt bound to hold that the point at such a belated stage could not be taken.

The appeal is dismissed with costs.

V.W./D.H. *Appeal dismissed.*

[Case No. 89.]

A. I. R. (33) 1946 Patna 218

FAZL ALI C. J. AND RAY J.

Chunku Manjhi and others —
Appellants

v.

Bhabani Majhan and others —
Respondents.

Appeal No. 33 of 1944, Decided on 20th September 1945, from appellate decree of Sub-Judge, Dhanbad, D/- 22nd November 1943.

(a) Hindu law—Applicability—Aborigines of non-Hindu origin can be hinduised so as to be governed by Hindu law — Formal ceremony of conversion not necessary — Test to determine whether people of non-Hindu origin have become Hindus, indicated.

It is possible in law that aborigines of non-Hindu origin can become sufficiently hinduised so that in matters of inheritance and succession they are *prima facie* governed by the Hindu law except so far as any custom at variance with such law is proved. For the purpose of Hinduisation, any formal ceremony of conversion is not necessary. The test as to whether the people of non-Hindu origin have become Hindus out and out consists not in their following the religious rules of *Srutis* and *Smritis* or their completely giving themselves up to Brahmanical rules and rituals, but in their acknowledging themselves to be Hindus and in adopting Hindu social usages, the retention of a few relics of their ante-Hinduism period notwithstanding: *Case law reviewed.* [P 223 C 1]

Hindu Law —

(38) Mayne, N. 54.

(40) Mulla, Page, 17, Pts. (s), (t) and (u).

(b) Hindu law — Applicability — People of non-Hindu origin completely hinduised — They are *prima facie* governed by Hindu law, except so far as any custom at variance with such law is proved — Burden of proving such custom is on party who sets it up.

Where in cases of people of non-Hindu origin complete Hinduisation is proved, the parties are to be *prima facie* governed by the rules of the Hindu law, and the burden of proving that any special custom obtained in the community either as a relic of their non-Hindu period or otherwise, is upon the party who sets it up: (31) 18 A. I. R. 1931 Pat. 305, *Rel. on; Case law discussed.* [P 223 C 1]

Hindu Law —

(38) Mayne, N. 54, Pt. (s).

(40) Mulla, P. 17, Pts. (t) and (u).

(c) Hindu law — Applicability — Question whether non-Hindu tribe has been hinduised so as to attract provisions of Hindu law is mixed question of law and fact.

The question whether a family or a tribe of non-Hindu origin has been so far hinduised as to attract the provisions of the Hindu law in matters of inheritance and succession, is a mixed question of law and fact. [P 223 C 2]

(d) Hindu law—Applicability — Santhals of Chota Nagpur are governed by Hindu law — Hindu Law of Inheritance (Amendment) Act (2 [II] of 1929) applies to them.

The Hindu Law of Inheritance (Amendment) Act, 1929, applies also to those persons 'who but for the passing of the Act, would have been subject to the law of Mitakshara.' Thus, it applies to Santhals of Chota Nagpur who are Hindus and are governed by the Mitakshara School of Hindu law in matters of inheritance and succession. [P 224 C 1, 2]

B. C. De and K. D. De — for Appellants.

K. D. Chatterjee — for Respondents.

Ray J.—This appeal arises out of a suit instituted by Bhabani Mejhan, the plaintiff, for declaration of title and recovery of possession of the lands in suit. The lands admittedly belong to one Chota Manjhi. Chota Manjhi's only issue, a daughter by name Darani Mejhan, predeceased him. He died leaving a widow by name Churamani Mejhan. The plaintiff is the daughter of Darani Mejhan. The plaintiff had a brother Chandra Manjhi who is dead. Churamani Mejhan continued in possession of the property after the death of her husband till she died in the month of Saban 1347. She executed a deed of gift in respect of a part of the property in favour of the present plaintiff who is her daughter's daughter. On her death, the properties in dispute were taken possession of by the defendants who are separated agnates of the last male holder Chota Manjhi. They claim themselves to be his heirs to the exclusion of the plaintiff, who, according to them, is not an heir.

Out of the four agnates impleaded as defendants, defendants 3 and 4 filed a written statement supporting the plaintiff's claim. Defendants 1 and 2 contest the suit and they are the appellants in this Court. The plaintiff bases her title as an heir of the last male holder of the property being his daughter's daughter on the ground that the parties are Hindus and in matters of succession and inheritance, they are governed by the Mitakshara school of Hindu law as amended by Act 2 [II] of 1929. She also says that by tribal customs too she is the heir. Her case is set out in para. 5 of the plaint, which reads:

"Churamani Mejhan died in the month of Srawan 1347 and the properties in Schedule 'ka' were in her possession. After the death of Churamani the plaintiff being the daughter's daughter of Chotu Manjhi is the sole heir, and has got absolute interest in the Schedule 'ka' properties by inheritance. The Santhals of the country follow the Mitakshara school of Hindu law, and apart from this, the plaintiff is also the heir of Chotu Manjhi according to tribal custom as well."

In reply to this, defendants 1 and 2 in their written statement para. 4 pleaded:

"These defendants submit that the parties are governed by the Dayabhag school of Hindu law, and all their acts are done under the said system of Hindu law. According to neither school of Hindu law can the daughter be an heir of any means. The plaintiff's statements are against the law and are liable to be rejected."

According to the pleadings of the parties, as they stood before the amendment of the written statement, which I am going to notice presently, they admit that in matters of succession and inheritance, they are governed by the Hindu law, the only difference between them being about the particular school which governs them. According to the plaintiff, it is Mitakshara school of Hindu law, while according to the defendants it is Dayabhag. Issues were framed on the pleadings set forth above; the parties then took various adjournments and summoned witnesses in support of their respective cases. The defendants were particularly ready on several dates of hearing to go on with the trial on that pleading. About ten months after their first written statement filed, the contesting defendants filed a petition for amending the same. The amendment, proposed a radical change in their case, but unfortunately the said amendment was allowed by the learned trial Court on the reasoning of low intellectual capacity of the defendants. The amended written statement, so far as it relates to this aspect of the parties' case, reads as follows:

"These defendants never gave any advice to file a written statement to the effect that these defendants are governed by the Dayabhag system and all their acts are done according to that school, nor is that fact true. Rather they are aboriginal and the parties have no concern with Mitakshara and any other school of Hindu law."

In fact the parties are governed by tribal custom. According to their custom females cannot inherit, only the wife gets the enjoyment of the properties left by the husband during her lifetime. And this is the advice they gave. The former statement is not correct, this later statement is true and correct."

After this amendment, the point at issue between the parties is whether the parties are Hindus, and are governed by the Mitakshara school of Hindu law in matters of inheritance and succession, or whether they being non-Hindus, a customary rule of agnatic succession excluding the females obtains amongst them.

The learned trial Court gave the plaintiff a decree finding that according to tribal custom established before him daughter's daughter, such as the plaintiff, is an heir and not the defendants as agnates. He, however, on consideration of evidence before him in that behalf came to the conclusion that the parties are not Hindus. In this connection he referred to the observations of Macpherson J. in A.I.R. 1925 Pat. 733¹ and to the observations of Manohar Lall J. in 22 P.L.T. 829.²

The defendants preferred an appeal against this decision of the learned Munsif, and the learned lower appellate Court upheld the decree of the learned Munsif but on different findings. The learned lower appellate Court held that the parties are Hindus, and, as such, they are governed by the Mitakshara school of Hindu law except in so far as any special custom at variance with it is proved. He also held, independently of the question of onus, that the plaintiff has succeeded in proving that the females do inherit in accordance with the local tribal custom to the exclusion of the agnates and the defendants have failed to prove the contrary.

The defendants have preferred this second appeal, and the learned counsel, appearing for them urges, in the main, that the parties belong to an aboriginal tribe called Santhals and are outside the pale of Hinduism. The evidence on record does not establish that the Santhals, to which class the parties belong, have been converted to Hinduism. The circumstance that the parties worship ghosts

1. (25) 12 A. I. R. 1925 Pat. 733 : 89 I. C. 796, *Kritibash Mahton v. Budhan Mahtani*.

2. (41) 28 A.I.R. 1941 Pat. 625 : 198 I. C. 680 : 22 P. L. T. 829, *Harakhnath Ohdar v. Ganpat Rai*.

is inconsistent with their being Hindus. The onus of proof lay heavily upon the plaintiff to prove either that they were governed in matters of succession and inheritance by the rule of the Mitakshara school of Hindu law, or that the plaintiff, as the daughter's daughter of the last male owner, could succeed in preference to the agnates by custom obtaining in the tribe; that the plaintiff has failed to discharge the same. His other contentions will be noticed presently. The learned counsel in support of his contention of agnatic rule of succession and female exclusion relies upon Risley on Tribes and the judgment of Macpherson J., in A. I. R. 1925 Pat. 733.¹

The learned counsel on behalf of the respondents urges, in reply, that the Santhals are sufficiently Hinduised even though they retain some of the relics of their ante-Hinduism period, and are, therefore, governed by the Mitakshara school of Hindu law which is *lex loci* of the area in which the parties live. In his view what Risley wrote is merely of historical importance and the Santhals have subsequently been absorbed into the Hindu community, and, therefore, the presumption is that they are governed by the Hindu law. He further urges that the issue raised by the defendants that, amongst the Santhals, the females are excluded from inheritance has not been substantiated by them. He also contended that the matter is concluded by the concurrent findings of fact by both the Courts below.

The material question, therefore, is whether the parties are Hindus and as such governed by the Mitakshara school of Hindu law, in matters of inheritance and succession, or, whether the plaintiff is an heir to her maternal grandfather in preference to the latter's agnates who are the defendants in the suit in accordance with any well established tribal customs.

Risley in his historical work on tribes says that the Santhals are aborigines and are not governed by the Hindu law in matters of inheritance and succession. In such matters agnatic succession is the rule. Macpherson J. in A. I. R. 1925 Pat. 733,¹ cited above, says the same thing though his observations were not necessary for the decision of the case. It was conceded by the parties in that case that the Hindu law of succession was applicable. Manohar Lall J. in 22 P.L.T. 829² holds the observations of Macpherson J. to be *obiter dicta*. He leaves the question open to be decided, in each case, on its own facts. It is, therefore, to be examined on the

evidence adduced by the parties viewed in the light of the authoritative pronouncements bearing upon the subject, whether the Santhals of Chota Nagpur, to which tribe the parties belong, are Hindus, and, as such, governed by the Hindu law relating to inheritance and succession. Mr. B. C. De for the appellants contends that nothing short of conversion to Hinduism by a ceremony of expiation would prove them to be Hindus. This contention, in my view, cannot be upheld.

The term "Hindu" is not an anthropological one but is used in a theological sense as distinguished from national or racial sense. Stokes in his Anglo-Indian Codes states his conclusion that the term is theological denoting any person professing any form of the Brahmanical religion or religion of the Puranas. In 3 M. H. C. R. 50³ it was held that the term 'Hindu' being a theological expression, it is legally permissible to a non-Hindu to become a Hindu. In 11 Cal. 463⁴ dealing with the case of a family which was of non-Hindu origin, their Lordships held that if its members had become Hindus out and out, they would be governed by the Hindu law unless a special custom was proved. In 2 Pat. 230⁵ the Court had to deal with a clan who became converted to Hinduism about 100 years previously and the Judicial Committee held that the clan "had become sufficiently Hinduised," to be *prima facie* governed by the Hindu law. The expressions (1) "Hindus out and out" and (2) "become sufficiently Hinduised" are the expressions used by the Privy Council. In the last-mentioned case, their Lordships, referring to 48 I. A. 539⁶ allude to a mass of tribes in Southern India who became Hinduised and therefore subject to the law of the Smritis in most respects. In none of these cases is there any indication that any ceremony of purification is a prerequisite of Hinduisation.

In this connection it would be profitable to note that Sir Charles Eliot, in his valuable work "Hinduism and Buddhism," says:

"It is not quite correct to say that one must be born a Hindu, since Hinduism has grown by gradually Hinduising the wilder tribes of India and the process still continues."

3. ('66-67) 3 M. H. C. R. 50, Tara Chand v. Reeb Ram.

4. ('85) 11 Cal. 463; 12 I.A. 72; 4 Sar 610 (P.C.), Fanindra Deb v. Rajeshwar Das.

5. ('23) 10 A. I. R. 1923 P. C. 21; 2 Pat. 230; 50 I. A. 58; 71 I. C. 769 (P. C.), Sahdeo Narain v. Kusum Kumari.

6. ('22) 9 A. I. R. 1922 P. C. 228; 44 Mad. 740; 48 I. A. 539; 64 I. C. 439 (P. C.), Palaniappa Chetty v. Alagan Chetty.

The chief feature of Hinduism is its tendency to absorb beliefs and to combine and amalgamate deities. There was a great fusion of ideas and even Persian and Greek religions made their contribution. The amplification of Hinduism and the absorption of non-Hindu tribes into the Hindu fold were not necessarily two distinct and separate processes. Whenever a popular cult grew important or whenever Brahmanic influence spread to a new district possessing such a cult, the popular cult was recognised and brahmanised. This policy can be abundantly illustrated for the last four or five centuries. If non-Hindu Gods were thus accorded recognition, non-Hindu tribes were similarly absorbed. The treatment by Hinduism of men and Gods is curiously parallel. The learned author also points out that according to Census of India, 1911, in Assam about 80,000 animists were converted to Hinduism between 1901 and 1911. In 52 Mad 160⁷ at p. 171, it is said:

"according to the law of British India in the case of Hindus (as in the case of Muhammadans) questions of personal law are determined not by the test of domicile, but by reference to the religious community to which those persons belong. In other words, the law of Hindus and Muhammadans is the law of their religion."

The learned Judge, who decided the last mentioned case referring to the judgment of the Judicial Committee in 9 M.I.A. 195⁸ says

"that the intimate connection between law and religion in the case of Hindus and Muhammadans exists because of the written law of India has prescribed broadly that in questions of inheritance and succession, the Hindu law is to be applied to Hindus and the Muhammadan law to Muhammadans."

The question, therefore, has to be decided by coming to a conclusion as to how far the parties have become either Hinduised out and out, or sufficiently Hinduised in order to attract the principles of Hindu law in matters of inheritance and succession. It is quite certain that for the purpose of Hinduisation any ceremony of conversion is not at all necessary. In the above-mentioned single Judge case in 52 Mad. 160⁷ there appears a passage lending support to the contention that such a ceremony is necessary before a non-Hindu could become a Hindu. This passage, however, came for consideration before a Division Bench of the Madras High Court in A.I.R. 1937 Mad.

172.⁹ Their Lordships in the last mentioned case, after referring to the passage, said :

"This passage is clearly no authority for the position that a formal conversion is a pre-requisite to a person becoming a Hindu."

Again in A. I. R. 1934 Mad. 630,¹⁰ Varadachariar J., (as he then was) points out referring to the self-same passage, that the passage does not lay down that every one of the tests mentioned there should be fulfilled where conversion to Hinduism is alleged. In 8 M.I.A. 43,¹¹ an Englishman had five children by two native Hindu women, one of whom was of Brahmin caste, a married woman though living apart from her husband. The five children were brought up as Hindus and lived together as a joint family. It was held by their Lordships of the Privy Council that the illegitimate children were to be considered as Hindus and their rights were governed by that law. This case illustrates that the question of Hinduisation will be approached from a liberal angle of vision depending on how the family or community treat themselves and their Hindu mode of living. In 2 Pat. 230⁵ two questions came up for decision, namely, (1) whether in every case in which applicability of Hindu law is based upon the ground of conversion of the family or the tribe of non-Hindu origin into Hinduism, the burden of proof should be put strongly upon the party invoking the doctrines of Hindu law, and (2) whether, if it would be proved, in such a case, that there was a customary law of succession before these people became Hinduised, that custom could be abrogated by conversion. With regard to the first proposition, reliance was placed, in course of argument, on the case in 11 Cal. 463.⁴ Their Lordships in deciding the first question said that the effect of the decision in 11 Cal. 463⁴ was correctly stated by their Lordships in 49 I.A. 119¹² where their Lordships expressed themselves as follows :

"The question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus, they would have been governed by Hindu law and there would have been this power. But though they affected to be Hindu, that in fact was not their status ; the utmost that could be said was that, though the family had introduced many Hindu customs, they in fact were governed by family custom. Of such

9. (37) 24 A.I.R. 1937 Mad. 172 : 167 I.C. 488, Ramayya v. Mrs. Josephine Elizabeth.

10. (34) 21 A.I.R. 1934 Mad. 630 : 155 I.C. 708, Gurusami Nadar v. Irulappa Konar.

11. (1859 61) 8 M.I.A. 43 (P.C.), Sm. Anundmohy Dossee v. John Doe.

12. (22) 9 A.I.R. 1922 P.C. 59 : 45 Mad. 308 : 49 I.A. 119 : 67 I.C. 115 (P.C.), Muhammad Ibrahim Rowther v. Sheikh Ibrahim Rowther.

7. (28) 15 A.I.R. 1928 Mad. 1279 : 52 Mad. 160 : 111 I.C. 364, Morarji v. Administrator-General, Madras.

8. (1861-63) 9 M.I.A. 195 : 2 Sar. 10 : 1 Suther 501 (P. C.), Charlotte Abraham v. Francis Abraham.

a family it was manifestly appropriate to remark that the question is not whether the general law is modified by a family custom forbidding adoption, but whether in respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit."

After quoting the aforesaid passage their Lordships said :

"Upon the principle thus laid down, the proper inquiry is whether this family can be said to have become so far Hindu as to throw the burden of proof upon the plaintiffs," [in this case the plaintiffs claimed to be governed by family custom and not by Hindu law alleging themselves to be of non-Hindu origin] "or whether the opposite conclusion should be come to, which would throw the burden upon the defendant," [who was claiming the right of an adopted son under the Hindu law on the ground that the family had been Hinduised.]"

The question, therefore, in every case whenever it arises, is whether the family or clan has been sufficiently Hinduised. If this question is decided in affirmative, the presumption will be that the parties were governed by Hindu law. Any custom at variance with Hindu law has to be proved by the party invoking the same. With regard to the second contention their Lordships said :

"The High Court, therefore, was right in treating it as a thing possible in law that this clan on the assumption that it was originally non-Hindu, had become sufficiently Hindu to make succession, by adoption, even if non-existent in non-Hindu times, come in with the rest of Hindu law, though the custom of non-adoption might be a survival as in 48 I.A. 539⁶."

In 30 I.A. 249,¹³ it was observed that there are various sects of importance, such as Buddhists, the Jains, the Brahmos and the Sikhs, who have entirely repudiated Brahmanism and to them the Hindu law applies as much as to those who accept that authority of the Vedas. It is clear, therefore, that in order to be completely Hinduised so as to attract the applicability of Hindu law, it is not necessary that a clan should embrace the strictly orthodox cult of Brahmanism. In 3 Pat. 152¹⁴ at p. 168 Jwala Prasad J. observed as follows :

"The law of succession and inheritance found in Ch. IX of Manu and in Ch. II of Yajñawalkya, the different commentaries of which have given rise to the different schools of the Hindu law in the country, as observed above, apply to persons who follow the religious rules as well as to those who do not follow the religious rules of the *Srutis* and the *Smritis*."

This authoritative pronouncement completely meets the argument of Mr. B. C. De that in order to hold that a particular class of

people of non-Hindu origin are governed by the Hindu law of inheritance and succession, it will have to be established that those people have submitted themselves completely to the Brahmanical and Shastric injunctions, have become believers in the Vedas and have been following the religious rules of the *Srutis* and *Smritis*. For becoming sufficiently Hinduised, it will be quite sufficient, as I have shown above and as I shall show presently by reference to some more authorities, if they acknowledge themselves to be Hindus and adopt Hindu social usages, retention of some relics of their non-Hindu period notwithstanding. In another part of his judgment Jwala Prasad J., at p. 177 of the report has said :

"In my opinion it has not been shewn by the plaintiff that the parties in this case were governed by any law other than the Hindu law, and unless the plaintiff show that, the Hindu law must apply to them."

The circumstances under which the aborigines of non-Hindu origin can be governed by Hindu law in matters of inheritance or succession have been dealt with in two recent cases of this Court; one is that of A. I. R. 1931 Pat. 198.¹⁵ In this case Noor J. observes :

"The question whether a Mundari woman is or is not a Hindu is not very easy to decide. But the authorities are to the effect that the term 'Hindu' can safely be applied to all those who claim to be Hindus and are regarded by the society surrounding them to be Hindus."

Reference may be made to Gour's Hindu Code, 2nd Edn., Art. 322 where the learned author observes as follows :

"Besides the Hindus properly so called, and those who are commonly so called, there remains a number of people belonging to the aboriginal tribes such as Gonds, Bhils, Kurds, Santals, Kochees of Assam, Aroras of the Punjab, Khatika, Kumbars and the like, who have become absorbed into the Hindu society and who consequently consider themselves Hindus, and as such bound by Hindu law. The test of their case is the same. How do they regard themselves and how are they regarded by the rest of the Hindu community."

In A.I.R. 1931 Pat. 305,¹⁶ Jwala Prasad J., observes :

"The question then is what is the law of succession governing the parties. Reference has been made to a number of authorities to the effect that once it is shown that a party is a Hindu it will be presumed that he is governed by the Hindu law of succession and the party who alleges a special custom has to prove the same. In this particular case we have the admission on the part of the plaintiffs that the parties have now become Hindus and have adopted the Hindu religion. The presumption, therefore, would follow that ordinarily they

13. ('03) 31 Cal. 11 : 30 I.A. 249 : 84 P. R. 1903 : 8 Sar. 543 (P.C.), Rani Bhagwan Koer v. J. C. Bose.

14. ('24) 11 A. I. R. 1924 Pat. 420 : 3 Pat. 152 : 78 I. C. 749, Rampershad Singh v. Mt. Dahan Bibi.

15. ('31) 18 A.I.R. 1931 Pat. 198 : 132 I. C. 353, Doman Sahu v. Buka.

16. ('31) 18 A. I. R. 1931 Pat. 305 : 11 Pat. 139 : 133 I. C. 165, Ganesh Mahto v. Shib Charan.

would be governed by the Hindu law of succession. In A. I. R. 1928 Mad. 299¹⁷ the question was considered by a Full Bench of the Madras Court in relation to a community who were originally non-Hindus but had subsequently adopted the Hindu religion. It was held in that case that in the case of persons professing the Hindu religion, the Hindu law as expounded in the Smritis and commentaries prevalent in the Province in which the dispute arises should *prima facie* govern the parties though it is open to show that the Hindu law has been either modified by custom or that particular rules have not been adopted by the community who retain in that respect their original customs; and it must be presumed that the parties are governed by the Hindu law except in so far as they prove any custom which is at variance with it."

To sum up, the position is that it is possible in law that aborigines of non-Hindu origin can become sufficiently Hinduised so that in matters of inheritance and succession they are *prima facie* governed by the Hindu law except so far as any custom at variance with such law is proved; that for the purpose of Hinduisation any formal ceremony of conversion is not necessary, that the test as to whether people of non-Hindu origin have become Hindus out and out consists not in their following the religious rules of the Srutis and Smritis or their completely giving themselves up to Brahmanical rules and rituals but in their acknowledging themselves to be Hindus and, in adopting Hindu social usages, the retention of a few relics of their ante-Hinduism period notwithstanding. In cases where complete Hinduisation is proved, the parties are to be *prima facie* governed by the rules of the Hindu law, and the burden of proving that any special custom obtained in the community either as a relic of their non-Hindu period or otherwise is upon the party who sets it up. The case in A.I.R. 1929 Cal. 577¹⁸ affords some illustration of the tests to be applied for the purpose of determining Hinduisation of non-Hindu tribes. In that case, adoption of Hindu names, employment of priests, performance of Pujas, such as Durga Puja, Mansa Puja, Kali Puja, etc., offering of pindas, observance of mourning, performance of funeral ceremonies, were held sufficient proof of a family aboriginal in origin having adopted Hinduism in its entirety, and the nature of the oral evidence was, as in the present case, several witnesses saying the family is a Hindu family, or

the members of the family are Hindus by creed.

I will now proceed to examine the evidence in this case in the light of the law laid down in the judicial pronouncements referred to above. I have thought it proper to go into evidence keeping in view that the question whether a family or tribe of non-Hindu origin has been so far Hinduised as to attract the provisions of Hindu law in matters of inheritance and succession is a mixed question of law and fact. On reading the evidence, I find defendant 1 admitting that he belongs to the caste of Santhal. The learned Judge, who decided the case in A. I. R. 1929 Cal. 577,¹⁸ observes that it is only the Hindus who speak of caste. The same witness, defendant 1 says that he along with other agnates performed the sradh and fed people on the occasion of the death of the plaintiff's mother's mother. He speaks of jointness in mess and property and separation as prevalent in Hindu Mitakshara family. He says "defendants 3 and 4 are not joint with us in mess and property." P. W. 3 deposes that if out of two brothers one dies, the other brother gets the property, but if they are separate and the deceased leaves a daughter, the daughter succeeds. P. W. 1 in cross-examination says "we perform Durga Puja, Kali Puja and Badna Puja." D. W. 1 says:

"There are Bengalis in those neighbouring villages. We have to go to these villages. In these villages Durga Puja and Kali Puja are performed. We go to witness these festivals and dance there. We bow in front of the idols. Bhakta festival is done."

He further says "we perform bhoj (pinda) at the time of death of anybody." It is admitted by the plaintiffs as well as the defendants' witnesses that they engage priests, though of their own caste, for the performance of marriage ceremonies. It is further deposed that at the time of marriage the bridegroom puts vermilion on the forehead of the bride. This custom is observed in Hindu societies, vermilion being the sign of a married woman whose husband is alive. As to the applicability of the law of survivorship, P. W. 2 says:

"If two brothers live jointly and if one dies, his property devolves upon the other brother. If they are separate, the property devolves on the widow in the absence of a son."

It also appears from the plaint and the memorandum of appeal that the parties have adopted Hindu names such as Bhabani (plaintiff) Pandu and Kesar (defendants 3 and 4), Ganesh, Mahesh, Jugal and Kali sons of appellant 2 substituted on his death in

17. (28) 15 A. I. R. 1928 Mad. 299 : 51 Mad. 1 : 108 I. C. 760 (F. B.), Mooka Kone v. Ammakutti Ammal.

18. (29) 16 A.I.R. 1929 Cal. 577 : 118 I. C. 342, Narendra Narain v. Nagendra Narain.

his place. Besides the adoption of the above Hindu social and religious usages as spoken to by the witnesses examined in the case, we have strongest evidence afforded as to the complete Hinduisation of the parties by the fact that at the stage of framing of issues and till almost the very last stage of the suit both parties asserted that they were Hindus, the only difference being as to whether Mitakshara or Dayabhag school of law would govern the question of inheritance at issue. The amendment was an afterthought and not *bona fide*. With regard to the correctness of the first statement, defendant 1 deposes :

"I got the written statement by Ramesh Babu. I told him that we are governed by the Santal custom. I cannot say what he wrote. I am illiterate."

No reliance can be placed upon this evidence which by necessary implication denotes that the pleader concerned in drafting the written statement went against the positive instructions of his client. It is also asserted by the defendant that on the death of a male holder of a property, his widow succeeds and her right is a limited one as it is in Hindu law. This evidences a departure from the rule of agnatic succession in their non-Hindu period. The plaintiff has exhibited a judgment in which the right of a female to succeed in preference to the agnates was upheld, while the defendants have adduced no evidence whatsoever to show that in a case of disputed succession, agnatic rule has been recognised by Court. Both the Courts have concurrently found that succession by females such as widow, daughter and daughter's daughter is a well established rule amongst them. This militates against the defence case of agnatic rule of succession. This rather proves complete Hinduisation of the clan. I cannot view this rule of succession as a survival of their old custom. Either it is a customary rule of succession or a rule of Hindu law. It is more probably the latter when judged with other Hindu social customs and usages adopted by their community. Their pleadings denote their consciousness of their Hindu status. It has been brought to our notice that according to Manbhum settlement report by far in majority of Santals have been recorded as Hindus. In this state of pleadings of the parties and the evidence, I agree with the finding of the learned lower appellate Court that the parties are Hindus and in matters of inheritance and succession they are governed by Hindu law. The defendants having abandoned their defence as to their being governed by the

Dayabhag school of Hindu law as against the Mitakshara school, and there being absolutely no evidence in support of such a plea, and the evidence as to Mitakshara school prevailing amongst the community being completely one sided, make it perfectly clear that the Mitakshara school of law governs the parties in matters of inheritance and succession. That being so, the plaintiff is an heir according to S. 2 of Act 2 [II] of 1929. Mr. B. C. De has contended that even though it be held that the parties had been converted into Hinduism, the Hindu Law of Inheritance (Amendment) Act, 1929 (Act 2 [II] of 1929), will not apply to the case as the Act applies only to Hindus and not to those who are only converts. But sub-s. (2) of S. 1 of the Act is a complete answer to this contention. The sub-section reads:

"It extends to the whole of British India, including British Baluchistan and the Santhal Parganas, but it applies only to persons who but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will."

In view of the finding that the parties are governed by the Mitakshara school of Hindu law in matters of inheritance and succession, they come clearly within the meaning of "person who but for the passing of this Act, would have been subject to the law of Mitakshara." I have, therefore, absolutely no doubt that the Mitakshara school of Hindu law as modified by the provisions of Act 2 [II] of 1929 (Hindu Law of Inheritance (Amendment) Act, 1929) governs the present case and the plaintiff, therefore, has a preferential claim as heir of Chota Manjhi to the property in dispute, and is, therefore, entitled to declaration of title to and recovery of possession of the property in dispute. In this view of the matter, the question of the validity or otherwise of the deed of gift Ex. A executed by the plaintiff's vendor in her favour in respect of a part of the property does not arise for consideration. It may be noted as well that I entirely agree with the Courts below that the defendants have failed to establish that agnatic rule of succession still survives among the parties. I would, therefore, uphold the decision of the learned Subordinate Judge and dismiss the defendant's appeal with costs.

Fazl Ali C. J.—In view of the pleadings of the parties as they originally stood and the findings arrived at by the Courts below which are based on the evidence adduced in this case, I agree that the view taken by the

Courts below is correct and the appeal should be dismissed with costs.

V.W./D.H.

Appeal dismissed.

[*Case No. 90.*]

A. I. R. (33) 1946 Patna 225

MEREDITH AND RAY JJ.

Ramcharitar Sao and another —

Defendants — Appellants

v.

Bawan Prasad Singh and others —

Plaintiffs — Respondents.

Appeal No. 69 of 1942, Decided on 30th October 1945, from original decree of Sub-Judge, Patna, D/- 11th May 1942.

(a) Civil P. C. (1908), O. 34, R. 1 — Proper parties — Whether suit can proceed in the absence of — Test — On facts held suit was bad for defect of necessary parties.

In order to decide whether a suit can proceed in the absence of certain proper parties two tests have been laid down : (1) can the rights of the parties on the record be fully determined in their absence; and (2) can that determination be made necessarily affecting the rights of those absent : ('22) 9 A.I.R. 1922 Pat. 651, *Rel. on.* [P 227 C 1]

B owned 16 annas interest in a certain mouza. He executed ijara (usufructuary mortgage) of his interest in the mouza in favour of R for Rs. 17,000. Subsequent to the execution of the mortgage B sold his eight annas interest in the mouza to D. In the sale deed there was a clear provision that the vendee D was to redeem the ijara and out of the sale consideration a sum of Rs. 17,000 was left with D for redemption of the ijara. In a suit brought by B against R alone without impleading D for redemption of the ijara it was contended by R the mortgagee, that the mortgage being indivisible and incapable of redemption piecemeal the suit was bad for non-joinder of D as he was the owner of half the equity of redemption :

Held that the effect of the recital in the sale deed in favour of D was to make him a necessary party and not merely a proper party whichever of the two tests was applied. The suit was, therefore, bad for defect of necessary parties : *Case law referred.* [P 227 C 1; P 228 C 1]

C. P. C. —

('44) Chitaley, O. 34, R. 1, N. 6, Pt. 8.

('41) Mulla, Page 1058, Pt. (a).

(b) Deed—Consideration — Burden of proof — Definite and clear receipt of consideration in handwriting of each of several executants in presence of Sub-Registrar — Onus is strongly upon executants to show non-receipt.

In a registered document executed by several persons where there is a definite and clear receipt in the handwriting of each of the executants in the presence of the Sub-Registrar that they have received a certain amount of money as part of the consideration in cash, a strong onus is placed upon the executants to show that they did not in fact receive the money. (Upon consideration of all evidence, oral and documentary, held that entire consideration was paid to the executants.) [P 228 C 2]

(Tendency of some Courts to come to finding slap in the face of the recitals in registered docu-

ments and admissions definitely made in writing, merely upon the basis of oral evidence of doubtful character deprecated.) [P 230 C 1]

(c) *Res judicata* — Matter directly and substantially in issue — Court in previous suit merely expressing opinion on certain matter but no definite finding — Opinion not necessary for decision of that suit — Finding cannot operate as *res judicata*.

If a question is decided which is raised by the pleadings and if both parties have invoked opinion of the Court the decision would operate as *res judicata*. But a matter directly and substantially in issue cannot be said to have been heard and finally decided unless the finding on the issue was necessary for the decision of the suit : ('30) 17 A. I. R. 1930 Pat. 71, *Rel. on.* [P 231 C 1]

The mortgagors executed an ijara of their interest in a certain mouza in favour of the mortgagees for Rs. 17,000. Out of this consideration Rs. 13,000 were to be paid to a third party and the mortgagors admitted before the Sub-Registrar having received the balance of Rs. 4000. Simultaneously with the ijara, the mortgagors executed another simple mortgage in favour of the same mortgagee for Rs. 2000. In the suit on the latter bond filed by the mortgagees the Court, while deciding that the consideration of Rs. 2000 had not been received by the mortgagors expressed an opinion and incidentally held that the mortgagors had not received Rs. 4000 out of the consideration of the ijara, but no issue was framed regarding this in that suit. In a suit by the mortgagors for redemption of the ijara they claimed that they had not received Rs. 4000 out of the consideration and raised a plea of *res judicata* based on the finding in the suit on the simple mortgage :

Held that though in the earlier suit the opinion was expressed, it was merely because the evidence regarding Rs. 4000 was considered as being relevant to the determination of the question of the payment of Rs. 2000, but this was not directly and substantially in issue and there was no definite finding about the payment of Rs. 4000 which could in any event operate as *res judicata* as the question was quite foreign and was not necessary to the determination of the earlier suit : ('32) 19 A. I. R. 1932 P. C. 50 ; ('24) 11 A. I. R. 1924 P. C. 144 and ('37) 24 A. I. R. 1937 Mad. 114, *Disting.*; ('30) 17 A. I. R. 1930 Cal. 47, *Ref.* [P 230 C 1, 2]

C. P. C. —

('44) Chitaley, S. 11, N. 13.

('41) Mulla, Page 41, Note "Matter collaterally . . . in issue."

B. N. Mitter and Ajit Kumar Mitter —

for Appellants.

Sarju Prasad, Guneshwar Prasad and Dineshwar Prasad — for Respondents.

Meredith J. — This appeal is by defendants, and arises out of a suit for redemption of a usufructuary mortgage (ijara). The plaintiffs-respondents and their ancestor Madho Prasad Singh owned the 16 annas *milkiat* interest in Mouza Gangapore Pakri alias Barhibigha, Tauzi No. 12769, in the Patna District. On 22nd July 1925, they executed an ijara of the 16 annas in favour of the appellants Ramcharitar Sao and Ram Chander Sao for nine years, 1333 to 1341.

Fasli (1926 to 1934), the mortgage being for a sum of Rs. 17,000 and there being the usual provision that the mortgagees would enjoy the usufruct in lieu of interest. The bond was executed, according to the plaintiffs, for payment of a sum of Rs. 13,000 to one Deo Narain Singh and Rs. 4000 to one Ram Narain Singh who had transferred to the plaintiffs his 3 annas share of the *milkiat*. The bond was duly registered, and the plaintiffs admitted before the Sub-Registrar the receipt of the Rs. 4000, but not of the Rs. 13,000 which was subsequently admittedly paid to Deo Narain Singh and a receipt was taken.

The plaintiffs brought the suit on the allegation that in fact the Rs. 4000 was never paid. The defendants, therefore, enjoyed the possession of a proportionate share of the property to which they were not entitled, and the usufruct of this share amounted to a sum sufficient to discharge the entire mortgage and to leave a sum of Rs. 158 due to the plaintiffs, which they also claimed.

The defence was, first, that the whole consideration including the Rupees 4000 had been paid. Admittedly, Rs. 13,000 was paid to Deo Narain Singh on 27th August 1925, and the receipt (Ex. M) was taken. As for the Rs. 4000 that was brought to the registration office with a view to making the payment in the presence of the Sub-Registrar; the latter said he could not spare time for the money to be counted in his presence. It was, therefore, counted and made over in his verandah, and he subsequently endorsed the receipt written out by the plaintiffs upon the bond.

Secondly, the defendants contended that the suit was bad for non-joinder of necessary parties. It was admitted that on 26th November 1927, by the sale deed (Ex. G) 8 annas interest in the village, that is to say, an eight annas share of the equity of redemption, was transferred to certain persons under a sale deed (Ex. G). These persons were Dukhan, Gopal Das, Damri, Bandhu, Mangar, Manikchand and Lachhman. The plaintiffs filed *ladavi* deeds executed by Dukhan and Gopal Das, but Damri, Bandhu and Manikchand were still in possession of their interest, and Lachhman had transferred his to a third party who like these vendees was not impleaded. The mortgage being indivisible and incapable of redemption piecemeal, these persons were necessary parties.

The learned Subordinate Judge held that the plaintiffs' case was true. The suit should

not fail by reason of the defect of parties, and he, therefore, gave the plaintiffs a decree, directing, however, that a fresh account should be taken as the plaintiffs' account set out in the plaint was not correct.

Three questions have been argued before us: first, the question whether the plaintiffs' vendees were necessary parties; second, whether the Rs. 4000 was actually paid, and, third, whether it must be held upon the principles of *res judicata* that the Rs. 4000 had not been paid. The last question was raised in view of the fact that on the same day the *ijara* bond (Ex. A) was executed, a simple mortgage bond was also executed by the plaintiffs in favour of the defendants for a sum of Rs. 2000. On this bond the appellants brought a suit in the year 1932. That suit was dismissed on a finding that the Rs. 2000, the consideration of the simple mortgage bond, had not been paid, and in deciding that case the trial Court incidentally held that the sum of Rs. 4000 on the *ijara* had also not been paid. The judgment in that case was in 1934. An appeal was made to the District Judge and failed in 1935, and subsequently a second appeal was dismissed by the High Court.

I shall consider these three questions in turn. For the appellants reliance is placed on *Girwar Narain Mahton v. Mt. Makbunessa* (1 P.L.J. 468¹) in which it was held that a mortgage being indivisible if all persons interested therein are not made parties the suit must fail having regard to the provisions of O. 34, R. 1, Civil P. C., to which the provisions of O. 1, R. 9 must be regarded as subordinate. This decision, however, was reviewed by a Bench of this Court in *Sital Prasad Ray v. Asho Singh* (2 Pat. 175²). In that case the learned Judges held that O. 1, R. 9 was not subordinate to O. 34, R. 1, but that the effect of considering both together, so far as mortgages were concerned, was that,

"all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but failure to add one or more such persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. It is a fundamental rule of procedure that the Court cannot, by its decree,

1. (16) 3 A.I.R. 1916 Pat. 310 : 1 Pat. L. J. 468 : 36 I. C. 542.

2. (22) 9 A. I. R. 1922 Pat. 651 : 2 Pat. 175 : 69 I. C. 677 : 4 P. L. T. 698.

affect the rights of those who are not parties to the suit. If, therefore, no decree can be passed without affecting the right of absent parties the suit cannot proceed in their absence and should be dismissed."

It will be apparent that two tests have been laid down as to whether the suit can proceed in the absence of certain proper parties: (1) can the rights of the parties on the record be fully determined in their absence, and (2) can that determination be made necessarily affecting the rights of those absent. In my opinion, whichever of these tests be applied to the present case the result is the same. The absentees are necessary parties, and not merely proper parties. The reason for this is that in the sale deed of 26th November 1927 (Ex. G) there was a clear provision that the 8 annas vendees were to redeem the *ijara* (as well as the simple mortgage) and the sum of Rs. 19,564 out of the consideration was left in their custody for that purpose, that is to say, Rs. 17,000 for redemption of the *ijara* and Rs. 2564 for redemption of the simple mortgage with interest. Not only that, but the vendees executed a security bond (Ex. B) on the same date in respect of this sum of Rs. 19,564 and also an additional sum of Rs. 3000 and odd which was left in the vendees' custody out of the consideration.

The effect of this is, in my opinion, to make the vendees necessary parties. What would the position be if they had been impleaded? We do not know what their attitude might have been; though it may be observed that one of the vendees Lachhman was examined by the appellants and he supported their case, stating that the whole Rs. 17,000 was left with them and there was a clear understanding that they were to pay Rs. 17,000 to redeem the *ijara*. It might well have been then, if these persons had been impleaded, that some of the mortgagors as parties would admit receipt of the full consideration. In the circumstances, the character of the suit would have been largely changed, and the defendants, that is to say, the present appellants, would have been in a very much stronger position. Indeed, it is difficult to see how the suit for redemption could have succeeded without payment of the full Rs. 17,000, the mortgage being indivisible and incapable of redemption piecemeal; nor could the Court have allowed one part to be redeemed upon one basis and another part to be redeemed on a different basis. Thus, it is apparent that the position of the defendants may well have been prejudiced by the plaintiffs' failure to implead these

people. Let us apply the second test. It is quite true that the only question before the Court was, what are the rights and liabilities as between the mortgagors and the mortgagees. But the decision if the suit is decreed would put an end to the mortgage, and no further rights could remain in the plaintiffs' vendees as against the mortgagees. As I have said, we have no means of knowing what the case of these vendees might have been had they been impleaded. They might have admitted that the entire Rs. 17,000 was payable, but it is also conceivable, to take an extreme case, that they might have pleaded that the entire mortgage had been redeemed by them according to their contract and that nothing was due. Thus, it is conceivable that had they been parties they could have obtained a more favourable result than the plaintiffs have done, that is to say, it is possible that the position of the absentees *vis-a-vis* the mortgagees may have been prejudicially affected by the failure to implead them. They are left, as a result of the suit, if it succeeds with no remedy against the mortgagees.

It is no answer to say that for their right against the mortgagees is substituted a right against the plaintiffs. They were entitled as holders of part of the equity of redemption to a specific right against the mortgagees. That right has been taken away. A right against the plaintiffs is not the same right. The plaintiffs, for example, might be men of straw. The vendees might as a result of the suit be called on to pay a share of costs which they could have avoided had they been impleaded. Moreover, in any event they are driven to a second and unnecessary suit against the plaintiffs. Had they been parties to the redemption suit they would have been entitled to a decree for joint possession with the plaintiffs, whereas, as it is, possession of the 16 annas interest has gone to the plaintiffs.

The omission of the plaintiffs to implead these vendees must have been deliberate, and, in my opinion, they cannot be permitted to prejudice their position by omitting to implead them.

Mr. Sarju Prasad for the respondents has cited several rulings. He relies mainly on the decision of the Privy Council in *Yadalli Beg v. Tukaram* (48 Cal. 22.³) In that case it was certainly laid down that any one of the mortgagors may redeem the entire mortgage unless something has happened to extinguish

3. (21) S. A. I. R. 1921 P.C. 125 : 48 Cal. 22 : 16 N. L. R. 154 : 47 I. A. 207 : 57 I. C. 535 (P.C.).

it; but it was added that this must be subject to safeguarding the rights of any other persons also entitled to redeem and, moreover, the question of the necessity or otherwise of impleading those persons in the suit was not dealt with.

Next, reliance is placed on a decision of this Court in *Mt. Waleyatunnissa Begam v. Mt. Chalakhi* (10 Pat. 341⁴). That, however, was a suit by the mortgagee, and the decision was based on the principle that it is sometimes possible for the mortgagee to split the mortgage by giving up part of his claim. But it is one thing to hold that a mortgage can be enforced in part in the absence of certain of the mortgagors, and quite another thing to hold that a mortgage can be redeemed in the absence of certain of the mortgagors. It is perhaps significant that the Transfer of Property Act in S. 60 provides that one mortgagor cannot redeem his own share, except only in the one limited case referred to in the proviso, where the mortgagee has purchased part of the interest of the mortgagor.

Reliance is also placed on *Muhammad Yunus v. Champamani Bibi* (18 Pat. 141⁵), but that was also a suit by the mortgagee, and takes us no further than the case just previously referred to.

Lastly, reliance has been placed upon a decision of Sir Fazl Ali, sitting singly, in *Narain Pandey v. Surajbhan Lal* (A. I. R. 1937 Pat. 414⁶). That case follows 2 Pat. 175.² The decision, moreover, proceeded on the basis that in fact no defect of parties had been established, though no doubt there were observations on the point under consideration.

In my opinion, none of these cases help the respondents. I hold that the suit was bad for defect of necessary parties. No doubt, in ordinary circumstances it would be desirable to give the plaintiffs an opportunity under O. 1, R. 10, Civil P. C., to implead the absentees; obviously there is no question of limitation. Having regard, however, to the finding of fact at which I am about to arrive on the question of payment, I consider that no useful purpose would be served by a remand. It would only promote unnecessary and undesirable litigation.

I turn now to the second question: was the Rs. 4000 paid? I would like to point out,

in the first place, a thing not noticed by the learned Subordinate Judge, that the onus was on the plaintiffs to prove non-payment. The document (Ex. A) contained a recital that the Rs. 4000 had been paid before execution. That was admittedly not correct, and thereby the initial onus was no doubt discharged. But independently of that the plaintiffs, each one of them, endorsed in his own writing upon the bond receipt of Rs. 4000, in the presence of the Registrar and a witness. Having given a receipt, it would be for the plaintiffs to show that that receipt was not what it purported to be. The course adopted was, in fact, somewhat remarkable and, in my opinion, significant. At the time of registration which was on 25th July "Received rupees four thousand only" was first endorsed on the bond, as is usual, by one of the plaintiffs, Bawan Prasad Singh. The Sub-Registrar thereafter proceeded to endorse the admission of execution, and he then noted the receipt of Rs. 4000 as part of the consideration money admitted by all the above eight executants. And next appears a separate endorsement for each one of the eight, including again Bawan Prasad Singh in which each has written separately with his own pen "Received rupees four thousand only," and then at the bottom of that there is the signature of the Sub-Registrar, Mathura Prasad, who could not be examined as he was dead at the time of the suit, and of a witness Jhagru Mahraj. There is thus a definite clear receipt in the hand-writing of each of the plaintiffs made in the presence of the Sub-Registrar and a witness. Clearly this places a strong onus on the plaintiffs to show that they did not in fact receive this money. This question of onus is important, because the learned Subordinate Judge has found, and indeed it is quite clear, that practically all the oral evidence on both sides is unsatisfactory. The learned Subordinate Judge found none of the plaintiffs' witnesses impressive and regarded their evidence with suspicion, with the exception of one who, he said, had not been shown to be connected with the plaintiffs; but he omitted to notice that this one was Jhagru Mahraj, the very person who had witnessed the receipt written out by the plaintiffs.

Though the oral evidence was not satisfactory, the documentary evidence taken into consideration with the circumstances leaves in my mind no doubt that the money was actually paid. Apart from what I have already noticed with regard to Ex. A, and to which I would add that if the endorsement

4. ('31) 18 A. I. R. 1931 Pat. 164 : 10 Pat. 341 : 132 I. C. 100.

5. ('39) 26 A. I. R. 1939 Pat. 49 : 18 Pat. 141 : 179 I. C. 549.

6. ('37) 24 A. I. R. 1937 Pat. 414 : 69 I. C. 897.

of receipt of Rs. 4000 did not mean actual receipt but was only a formal matter, one would have expected a receipt for Rs. 17,000 to be written out, there are a number of other documents illustrating the plaintiffs' subsequent conduct. First of all, there is Ex. O. On 16th March 1926, the appellants got their names recorded in Register D on the strength of this *ijara*. No objection was put forward by the plaintiffs. There was no assertion then that they had not received the Rs. 4000.

I have already mentioned that the sale-deed (Ex. G) contains a clear recital that the whole of Rs. 17,000 was due to the defendants and was left with the vendees for paying off *ijara*, and a security bond (Ex. B) was also executed. On 7th May 1928, Ex. H was executed by the plaintiffs upon receipt of the balance of Rs. 3000 odd of the consideration which had been left for subsequent payment. This document is a discharge of the security bond, and deprived the plaintiffs of the further use of that security. One would certainly expect that, if Rs. 4000 extra still remained with the defendants, the plaintiffs would have insisted on maintaining the security bond, or would certainly have made some reference to the fact in Ex. H. On the contrary, however, there is not only no reference, but the plaintiffs expressly recite that now not a single shell out of the consideration of the sale-deed remains due to them.

That was the conduct of the plaintiffs in the year 1928. What was their conduct in 1930? It so happened that in 1929 the present appellants brought a money suit against one of the plaintiffs, Bawan Prasad Singh. That suit was decreed on compromise on 20th January 1930: see decree Ex. D. In that compromise the plaintiff accepted liability for the entire amount due under the decree, and no reference whatever was made to a sum of Rs. 4000 remaining due to him in the defendants' hands, upon which he could have claimed a set-off.

Now let us see what happened in the year 1931. In that year on 20th March a partition deed (Ex. I) was executed by the plaintiffs. Incidentally this *mauza* of Barhibigha was partitioned. There was no reference there also to the claim for Rs. 4000.

In this year also one of the plaintiffs' vendees Lachhman sold his interest to a third person by the sale-deed, Ex. G (1), dated 22nd December 1931. Whatever may be said of the plaintiffs, they were not parties to this transaction, and there was no reason

why any pretence should be kept up, yet there is a recital in the document that it was necessary for the vendees to pay the sum of Rs. 17,000 which was due on the *ijara*, and, therefore, Lachhman left with his vendee the proportionate share of that amount for payment on the *ijara*.

I have referred to the *ladavi* deeds executed by two of the vendees. These are Exs. 5 and 5 (a), the plaintiffs' documents. It is pointed out that they contain recitals that Rs. 13,000 had to be paid on the *ijara*. That is true, but it must be remembered that these deeds were executed in the year 1936, that is to say, after the decision in the suit upon the simple mortgage bond, and yet even then the documents contain a clear recital that the sum of Rs. 19,564 had been left with the vendees for payment to the mortgagees. It is perfectly clear in view of all this that actually the entire amount of Rs. 17,000 was left with the vendees for payment upon the *ijara*. Had the plaintiffs' case been true, there could have been no reason for this. The explanation put forward for the plaintiffs is that the deeds were all prepared with these recitals to make them agree with the *ijara* bond. Lachhman, one of the vendees, says that that is not the case. It was left because the vendees were directed by the plaintiffs to pay not Rs. 13,000, but Rs. 17,000 to the mortgagees. Apart from that, the plaintiffs' attempted explanation appears to be ridiculous. Had they not received Rs. 4000, there was no reason whatever why they should have subsequently wanted to hush up the fact. On the contrary, they would be anxious to assert the fact from the beginning, and secure recitals in documents to support their story.

Upon the basis of all this evidence I have no doubt that the entire consideration was paid. The plaintiffs have really nothing to discharge the onus which, as I have said, was upon them. The evidence is all to the contrary. It is pointed out on behalf of the respondents that Rs. 4000 was payable to Ram Narain for paying off one Surajmal. In fact, however, Surajmal was never paid in cash and eventually, on 23rd April 1926, the plaintiffs executed a bond (Ex. 3) in his favour. This, it is argued, shows that the plaintiffs could not have received the money. There is, however, an alternative explanation which seems to me equally possible, namely, that the plaintiffs having received the money had spent it for some other purpose, and so had to find another means of satisfying Surajmal. What does seem to me

significant is that, though Ex. 3 is a very long document containing full recitals about everything material, there is not one word to the effect that the plaintiffs were unable to pay as they had not received Rs. 4000 on the *ijara* which they had expected. It is merely stated that the plaintiffs find themselves unable to pay, which seems to me to suggest rather that they had spent the money.

It is quite true that it has been held that the Rs. 2000 on the simple mortgage was not paid, but the evidence with regard to payment of the two sums was quite different. It was the appellant's case that the Rs. 4000 had actually been brought to the registration office, shown to the Sub-Registrar and counted near him, if not in his presence. The receipt had been taken in the presence of the Sub-Registrar, and he had attested it. There was none of these in the case of Rs. 2000, which was said to have been paid elsewhere in different circumstances.

In my view the tendency of some Courts in this country to come to findings slap in the face of the recitals in registered documents and admissions definitely made in writing, merely upon the basis of oral evidence of doubtful character, is to be deprecated. I hold that the consideration of Rs. 4000 was paid.

There remains the question of *res judicata*. Admittedly, no issue with regard to the payment of the Rs. 4000 was framed in the previous suit, nor apparently was any such question raised in the plaint. The pleadings have not been filed nor the memorandum of appeal. We have merely got the summary of the plaint in the judgment. According to that summary, the plaintiffs (the present appellants) never raised any question as to whether the Rs. 4000 had or had not been paid.

It is true that an opinion on the point was expressed in the previous case, but that, I think, was merely because the evidence regarding the Rs. 4000 was considered as being relevant to the determination of the question of the payment of the Rs. 2000. It was no doubt relevant evidence, but it was not, to quote the words of S. 11, Civil P. C., "directly and substantially in issue."

Though no such issue was framed, the trial Court perhaps expressed itself somewhat more definitely on this question than was necessary, but the appellate Court was more careful. The learned District Judge was careful to come to a definite finding

only with regard to the question actually before him, namely, the payment of the Rs. 2000. He expressly decided only that point. No doubt, he made observations upon the other point and even expressed an opinion, but we are not concerned with his observations, only with his finding, and there is, as I read his judgment, no definite finding upon the payment of the Rs. 4000 which could in any event become *res judicata*.

Even if he had come to a finding, I still do not think that it would amount to *res judicata*, because it was a question foreign to the suit and unnecessary for decision, and upon which the plaintiffs did not invite decision. If the trial Court decided it, it went unnecessarily out of its way to do so. It was not a question which was so connected with the question in issue that the decision upon one must necessarily determine the decision upon the other. As I have said, the story and evidence with regard to the payment of the two sums were entirely different, and the case with regard to the payment of the Rs. 2000 was undoubtedly much weaker than that with regard to the payment of the Rs. 4000. It would be perfectly possible to hold, without inconsistency, that the Rs. 2000 had not been paid, while the Rs. 4000 had. It is perfectly obvious, therefore, that the question with regard to the Rs. 4000 was not necessary for decision.

Mr. Sarju Prasad has cited a number of rulings on the question of *res judicata*, but in my opinion none of them helps him. The first is a Privy Council decision in *Sri Sri Krishna Chandra Gajpati Narayana Deo v. Chella Rammanna* (36 C.W.N. 365⁷), but what was laid down therein was merely that if both parties choose, without protest, to put in a question in issue and invite a decision, that decision will be *res judicata*. That is certainly not the case here.

Next cited is another Privy Council case, *Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy* (51 I. A. 293⁸), but there again the basis of the decision on the question of *res judicata* was that the party who subsequently argued that the decision of the issue in question was unnecessary, had previously expressly invited the Court to decide that question, by making it a ground of appeal.

7. (32) 19 A.I.R. 1932 P.C. 50 : 136 I.C. 412 : 36 C.W.N. 365 (P.C.).

8. (24) 11 A.I.R. 1924 P.C. 144 : 51 Cal. 631 : 51 I.A. 293 : 80 I.C. 827 (P.C.).

Mr. Sarju Prasad has also cited a single Judge case, where the question has been discussed at considerable length, namely, *Kotayya v. Subbaya* (A.I.R. 1937 Mad. 114⁹). There again, however, stress is laid on the fact that the decision operates as *res judicata* against the person who has himself invited the Court to decide the point. It would perhaps be more correct to describe it as estoppel by judgment.

The next case cited is *Abdul Gani v. Nabendra Kishore Ray* (57 Cal. 253¹⁰). There it is pointed out that a matter may be directly in issue, though it is distinct from the subject-matter of the suit. That may be so, but it takes us no further in the present case.

Lastly, Mr. Sarju Prasad relies on a decision of this Court in *Sakaldip Singh v. Imrit Barhi* (10 P. L. T. 630¹¹). Therein the whole question is elaborately discussed by Chatterji J. and, if I may say so with respect, I entirely agree with his views, but I do not think they help the respondents. On the contrary, the case is definitely against Mr. Sarju Prasad's contention. It is no doubt, laid down that if a question is decided which has been raised by the pleadings and if both parties have invoked the opinion of the Court, the decision would operate as *res judicata*. But the learned Judges are careful to add that a matter directly and substantially in issue cannot be said to have been heard and finally decided, unless the finding on the issue was necessary for the determination of the suit. I have already held that in the case before us no determination of that question was necessary for the decision of the previous suit.

To the same effect was a subsequent observation of his Lordship that judgment operates by estoppel as regards all the findings which are essential to sustain the judgment. Applying that test also, there is no *res judicata* in the present case. A useful test is prescribed as to whether a finding is necessary, namely, whether an appeal would lie on the point. Applying this test also, there is no *res judicata* in the present case. There could be no appeal on any finding with regard to this question which was quite extraneous to the suit and which was merely incidental.

Lastly, S. 11 provides that for there to be any *res judicata* the parties in both suits must be litigating under the same title. It is admitted by Mr. Sarju Prasad that in the two suits with which we are concerned the parties were litigating under entirely different titles under two different bonds.

In my view there is no question of *res judicata* in the present case. Upon the finding which I have arrived at that the entire consideration of the bond was paid, the suit as framed by the plaintiffs could not succeed.

In the result, therefore, I would allow the appeal, and dismiss the suit with costs throughout.

Ray J. — I agree.
N.S./D.H.

Appeal allowed.

[Case No. 91.]

A. I. R. (33) 1946 Patna 231

MANOHAR LALL AND DAS JJ.

Amir Mahton and others—Defendants
— *Appellants*

v.

Sheopujan Missir and another, Plaintiffs and others, Defendants — Respondents.

Second Appeals Nos. 187 and 188 of 1944, Decided on 18th September 1945, from decision of Sub-Judge, Shahabad, D/- 24th November 1943.

(a) Evidence — Entries in public records — Chowkidari Assessment Register, entries in — Genuineness.

Where the entries in a Chowkidari Assessment Register are found to be otherwise genuine, the mere fact that the name of a person appears in the Register even after his death, does not necessarily prove that the Assessment Register is not genuine. [P 233 C 1]

(b) Civil P. C. (1908), S. 100 — Question of fact—Finding that parties are separate in status is one of fact.

Where on a consideration of the entire evidence, the lower appellate Court comes to the finding that, though there is no partition by metes and bounds, there is a complete cesser of commensality between the parties and the parties are in separate possession as tenants-in-common, the finding is essentially a finding of fact and cannot be re-opened in second appeal. [P 233 C 1]

C. P. C. —

(44) Chitale, Ss. 100 and 101 N. 36.

(41) Mulla, Ss. 100 and 101 Page 370 Pt. (s).

(c) Civil P. C. (1908), O. 7, R. 7; S. 96 — Claim for alternative reliefs—Decree not granting either relief but granting some other relief—Plaintiff can appeal.

It is doubtful whether a general rule can be laid down that in all cases where an alternative relief has been granted, the plaintiff has no right of appeal for getting a decree for the other relief which he had claimed in the plaint. [P 234 C 1]

9. ('37) 24 A.I.R. 1937 Mad. 114 : 168 I.C. 306.

10. ('30) 17 A. I. R. 1930 Cal. 47 : 57 Cal. 258 : 124 I.C. 161.

11. ('30) 17 A. I. R. 1930 Pat. 71 : 120 I.C. 292 : 10 P.L.T. 630.

Where a party claims recovery of possession of *rahan* property or in the alternative, a mortgage decree by sale of the *rahan* property and obtains a simple money decree only, it cannot be said that he has succeeded in getting one of the two reliefs which he had claimed, as he had not stated in the plaint that he would be satisfied with a simple money decree. Hence an appeal against the decree lies : ('24) 11 A.I.R. 1924 Cal. 445, *Disting.*

[P 234 C 1]

C. P. C. —

('44) Chitaley, O. 7, R. 7, N. 3 Pt. 17; S. 96. N. 6, Pt. 5.

('41) Mulla, O. 7, R. 7, P. 607; S. 96, P. 355.

(d) Co-sharers—Alienee from one co-sharer—Suit by, for possession against the other co-sharers—Form of decree—Decree for joint possession is proper.

A mortgages certain property with possession to B. B is obstructed in taking possession by C whereupon B files a suit for possession impleading A and C. It is found that the property is the joint property of A and C. A decree for joint possession can be passed in favour of B and C, and the parties may be left to work out their rights *inter se* subsequently in a suit for partition: ('20) 7 A.I.R. 1920 All. 111, *Disting.*

[P 234 C 2]

L. K. Jha, B. N. Rai and Kailash Rai —

for Appellants.

Tarkeshwar Nath, J. N. Sahai, Shambunath and Harians Kumar — for Respondents.

Das J.—These two second appeals by some of the defendants arise out of two suits for declaration of title and recovery of possession in the following circumstances. Tulsi and Panchayan were two brothers. Defendants 1 to 5 were the sons of Tulsi, and are appellants in the two appeals. Defendant 6, Mt. Batasia, was the widow of Panchayan, and Mt. Bipti (defendant 7) was the minor daughter of Panchayan. The plaintiffs-respondents—there are different plaintiffs in the two suits—claimed that Tulsi and Panchayan were separate in mess and business, and after the death of Panchayan, his widow, Mt. Batasia, came in possession of the properties left by him. She, for self and as guardian of Mt. Bipti, executed two *rahan* bonds in favour of the plaintiffs of the two suits—one of the documents being for a sum of Rs. 999, executed on 27th February 1939, and the other for a sum of Rs. 450, executed on 28th February 1939. Subsequent to the execution of the aforesaid mortgage bonds, there was a dispute between defendants 1 to 5 on one side and defendants 6 and 7 on the other with the result that the plaintiffs, who wanted to cultivate the lands mortgaged to them, were resisted by defendants 1 to 5. The plaintiffs, therefore, brought the two suits with regard to the lands mortgaged to them, and claimed the following reliefs :

"On an adjudication of the plaintiffs' title and want of title in defendants 1 to 5, possession over the *rahan* property may be caused to be delivered to the plaintiff and Rs. 100 may be awarded against defendants 1 to 5 by way of mesne profits, and orders for the recovery of future mesne profits may be passed.

2. If, for any reason, possession cannot be delivered to the plaintiffs, then Rs. 999 principal and Rs. 81 on account of interest, total Rs. 1080, may be caused to be realised by the sale of the *rahan* property."

I have quoted the reliefs *in extenso* from the plaint in one of the two suits, because one of the points, raised in appeal, depends on the question as to whether the plaintiffs-respondents could prefer an appeal to the lower appellate Court after having been given one of the reliefs claimed by them. The defence of the appellants in the two suits brought against them raised several points with which we are not at present concerned. The main defence was that Panchayan was all along joint with Tulsi, and with defendants 1 to 5 after Tulsi's death. Panchayan continued to be the *karta* of the family, and after his death, defendants 1 to 5 got the entire properties by the rule of survivorship. The appellants also alleged that Mt. Batasia was not the lawfully wedded wife of Panchayan.

The trial Court found in favour of the appellants on the question as to whether Panchayan and Tulsi were joint or separate. He found that the plaintiffs had failed to prove that the two brothers were separate. On this finding, he held that Mt. Batasia, widow of Panchayan, had no interest of her own in the property of Panchayan, which she could transfer to the plaintiffs-respondents. The trial Court, however, gave a simple money decree in favour of the plaintiffs against Mt. Batasia (defendant 6). The plaintiffs appealed, and the Court of appeal below found in favour of the plaintiffs on the question of separation of the two brothers, Tulsi and Panchayan. The learned Additional Subordinate Judge, who heard the two appeals, came to the finding that even though there was no partition by metes and bounds Tulsi and Panchayan lived separate, and there was a complete cesser of commensality between them. On this finding he gave the plaintiffs a decree for recovery of possession of the lands covered by the *rahan* deeds, jointly with defendants 1 to 5. It is against this decree in the two suits that the two appeals have been preferred by defendants 1 to 5.

Learned counsel for the appellants has raised three main contentions. Firstly, he

has contended that the Court of appeal below has drawn a wrong inference of separation of the two brothers from the evidence in the record. The Court of appeal below has relied on the entries in the Chaukidari Assessment Registers of the years 1926 and 1927 (Exts. 3 series). These entries show that Tulsi and Panchayan were separately assessed to chaukidari tax. Learned counsel for the appellants has contended before us that these entries cannot be correct, inasmuch as Tulsi was dead before 1926. The mere fact that the name of Tulsi appears in the Chaukidari Assessment Registers, even after his death, does not necessarily prove that the Assessment Registers were not genuine. As a matter of fact, both the Courts below have come to the finding that these Assessment Registers were genuine, and bore the seal of the Subdivisional Magistrate and the signatures of the punchas. It is also contended that the entries in these Assessment Registers do not by themselves give rise to the inference that Tulsi and Panchayan were separate. The Court of appeal below has not, however, based its finding merely on the entries on these Assessment Registers. It has taken into consideration other evidence, such as, some of the rent receipts, which show payment of rent by Mt. Batasia, canal *parchas* showing payment of water rate by Mt. Batasia and also the very significant fact that on 5th October 1936 Mt. Batasia had executed a mortgage bond in favour of one Chandrika Mahton (Ex. 2). This last document shows that before any dispute broke out between the parties, Mt. Batasia had been dealing with the property separately, as though she had inherited the property after her husband's death. The Court of appeal below has also considered the oral evidence in the case, and has taken into consideration the circumstance in favour of the appellants to the effect that the lands which originally belonged to the family had not been subdivided on the spot. On a consideration of the entire evidence in the record, the Court of appeal below has come to the finding that though there was no partition by metes and bounds, the evidence and circumstances of the case satisfactorily establish the fact that Tulsi and Panchayan were separate, and there was a complete cesser of commensality between them : they were in separate possession as tenants-in-common. This finding arrived at by the Court of appeal below is essentially a finding of fact, and cannot be re-opened in second appeal. I am unable to accede to the conten-

tion raised on behalf of the appellants that this finding is vitiated by any error of law.

Secondly, it has been contended on behalf of the appellants that the plaintiffs-respondents were given a decree by the trial Court which allowed them one of the reliefs claimed by them ; having got one of the alternative reliefs which they had claimed, it was not open to them to come up in appeal. Reliance has been placed on an unreported decision of this Court in Second Appeal No. 191 of 1940,¹ decided by Agarwala J. That was a case in which the appellant sued for recovery of possession of a house which was mortgaged to him by defendant 3. In the alternative, the plaintiff of the suit asked for recovery of the mortgage-debt of Rs. 200 against the mortgagor, defendant 3. There were two other defendants, defendants 1 and 2, who were in possession of the house and against whom a suit brought by defendant 3, had been dismissed prior to the institution of the suit, which gave rise to the appeal. The plaintiff was given a decree against defendant 3, and applying the principle laid down in A. I. R. 1924 Cal. 445,² it was held that the plaintiff could not succeed inasmuch as he had in his plaint expressed himself to be satisfied either with a decree for recovery of possession against defendants 1 and 2, or a decree for the sum advanced against defendant 3. The case in A.I.R. 1924 Cal. 445² was also of a similar nature. In that case, a suit was brought by the plaintiff-respondent for ejectment of defendants 1 and 2 from certain lands. The plaintiff, in the alternative made a prayer for assessment of a fair and equitable rent under S. 157, Ben. Ten. Act. The Court of first instance declared the plaintiff's *ijara* right to the eight annas share of the village and declared that the plaintiff would get rent of the lands in respect of his share, holding that the defendants were tenants with regard to these lands. There were appeals by both parties against the decision of the trial Court. The plaintiff appealed against the order fixing a fair and equitable rent under S. 157, Ben. Ten. Act, and the defendants appealed against the decree declaring the right of the plaintiff to the property in suit. The learned Judge in the Court below dismissed both the appeals. There was a second appeal by the defendant and a cross-appeal by the plaintiff. In the cross-appeal the plaintiff claimed

1. Second Appeal No. 191 of 1940, decided on 14th January 1941, Mt. Panchani v. Mt. Rikhia.
2. ('24) 11 A. I. R. 1924 Cal. 445 : 69 I. C. 504, Reajuddin Patwari v. Syed Abdul Jobbar.

that he was entitled to khas possession on the ground that the defendants were trespassers. In these circumstances, it was observed as follows :

"But he (the plaintiff) made an alternative claim under S. 157, Ben. Ten. Act, for assessment of a fair and equitable rent and the learned Judge in the Court below has given him relief under that section. It seems to me that he is not entitled to say that he does not want that alternative relief which has been granted to him, and that he desires to have the other relief which he claimed by way of ejectment. In effect, the plaintiff expressed that he would be satisfied with either of the two prayers which he made in his plaint and he succeeded in getting one and, therefore, he has no real cause for complaint."

The facts, as stated above, of the aforesaid two decisions are different from the facts of the cases before us. I have already quoted *in extenso* at the beginning of this judgment the reliefs which the plaintiffs-respondents claimed. The plaintiff-respondents claimed for recovery of possession or in the alternative a mortgage decree by sale of the *rehan* property. They did not state in the plaint that they would be satisfied with a simple money decree against Mt. Batasia (defendant 6.) The trial Court gave a simple money decree against Mt. Batasia in favour of the plaintiffs-respondents. It cannot, therefore, be said that the plaintiffs-respondents had succeeded in getting one of the two reliefs which they had claimed. In view of this distinction, it is unnecessary to consider the correctness or otherwise of the two decisions referred to above. I doubt, however, if a general rule can be laid down that in all cases where an alternative relief has been granted the plaintiff has no right of appeal for getting a decree for the other relief which he had claimed in the plaint. Section 157, Ben. Ten. Act, refers to alternative reliefs in a suit for the ejectment of a trespasser; it is open to the landlord to recognise a trespasser and accept him as a tenant. If he expresses himself to be satisfied with accepting rent from a trespasser, it is obvious that he cannot seek to eject him. The decision in A. I. R. 1924 Cal. 445² has reference to the facts of that case and the particular terms of S. 157, Ben. Ten. Act. I am unable to apply the principle of that case by analogy to the facts of the present case, which as I have shown above, are different.

Thirdly, it has been contended that the plaintiffs-respondents were not entitled to a decree for joint possession inasmuch as they had asked for possession of specific plots and no cosharer is entitled to say that he

has an exclusive right to any particular portion of the joint property and to confer an exclusive right on a third party by alienation without the consent of all the co-owners. Reliance has been placed on the case in A. I. R. 1920 ALL. 111.³ The Allahabad case, however, was one in which the plaintiff claimed exclusive possession of certain plots, though he had purchased by means of a sale-deed the three-fourths share in the khata in question. It was pointed out in that case that his vendors were cosharers to the extent of three-fourths in the khata which was admittedly joint zamindari property; it was then held that without the consent of the remaining co-owner they could not transfer an exclusive title to particular portions of the property as yet undivided. It was further pointed out that vendors did not effect to transfer their undivided share or a portion of it, and what they did was to earmark certain plots and transfer them as if they were the exclusive owners of them. The *rehan* bonds, on the basis of which the plaintiffs-respondents sued in the two suits in question, have not been printed. The learned Subordinate Judge has, however, made it perfectly clear that no exclusive possession can be given to the plaintiffs-respondents of any particular portion of the property belonging to the cosharers. The learned Subordinate Judge has expressed himself as follows:

"As I have already pointed out, in the absence of proof of partition by metes and bounds, the plaintiffs are not entitled to recovery of possession by ejecting defendants 1 to 5 from the suit lands. So far as these suits are concerned, the plaintiffs would be entitled to decree for joint possession with defendants 1 to 5. It may be open to the plaintiffs or to defendant 6 to seek partition by a properly constituted suit hereafter."

I do not see any particular objection to the form of the decree passed by the Court of appeal below. Obviously the plaintiffs-respondents will not get exclusive possession of any particular part of the property in dispute. Their right as *rehandar* has been declared and they have been given joint possession with the other cosharers. If any of the parties want exclusive possession of a particular part, a properly constituted partition suit would be necessary, as has been observed by the learned Subordinate Judge. The result, therefore, is that the contentions raised on behalf of the appellants fail and the appeals are dismissed with costs in favour of the plaintiff-respondents. There will be one hearing fee for both appeals.

3. ('20) 7 A. I. R. 1920 All. 111 : 55 I. C. 94, *Jamna v. Jhalli*.

Manohar Lall J.—I agree. On the facts found it is unnecessary to consider the correctness of the view expressed in some cases that the plaintiff cannot in appeal be granted the second alternative relief claimed by him.

D.R./C.V.

Appeals dismissed.

[Case No. 92.]

A. I. R. (33) 1946 Patna 235

MEREDITH AND IMAM JJ.

Pradip Chaudhry and others
Appellants

v.

Emperor.

Criminal Appeal No. 366 of 1945, Decided on 14th September 1945, from order of Sessions Judge, Monghyr, D/- 19th May 1945..

(a) Criminal trial—Evidence—Conviction of accused identified by at least six witnesses and acquittal of those identified by less — This is not proper way to estimate evidence.

Convicting those accused who were identified by at least six witnesses and acquitting those identified by five or less is rather a mechanical standard for judging the evidence and is not the proper way to estimate evidence. There is no virtue in a multiplicity of witnesses if once it is found that most of them are interested. [P 238 C 1]

Cr. P. C. —

('41) Chitaley, S. 367, N. 6 Pts. 11 and 13.

(b) Criminal trial—Evidence—Some accused implicated being relatives of principal accused — Some old accused also implicated — Large number of accused said to be identified—Very strict standard in weighing evidence must be adopted.

Some of the accused who were old men of over 60 were implicated by the prosecution as members of a mob and a large number, i. e., no less than 40 in all, were said to have been identified. There was strong reason to believe that some at least of the accused were implicated not because they were seen to take part in the assault but because they were relatives of the principal accused :

Held that it was difficult to believe that witnesses could have identified so many accused and a very strict standard must, therefore, be adopted in weighing the evidence against each accused.

[P 238 C 1, 2]

Cr. P. C. —

('41) Chitaley, S. 367, N. 6.

(c) Criminal P. C. (1898), S. 423 (1) (b) and (d) — Conviction under Ss. 324 and 148, Penal Code—Sentence under S. 324 only—Appellate Court setting aside conviction under S. 324 but maintaining that under S. 148—Appellate Court held could impose sentence under S. 148.

The accused was convicted by the Sessions Court under Ss. 324 and 148, Penal Code, and was sentenced to three years' imprisonment only for the offence under S. 324 but no separate sentence was imposed under S. 148 as the sentence imposed under S. 324 was considered sufficient. The appellate Court set aside the conviction under S. 324 but maintained that under S. 148 and imposed a

sentence of 18 months' imprisonment. It was objected that this could not be legally done:

Held that it would be a grave anomaly if when an appellate Court had found that a man had been rightly convicted for a serious offence it had to let him go scot-free merely because the trial Court had imposed the sentence under a wrong section. The appellate Court had ample power to transpose the sentence so long as the transposition did not amount to an enhancement. The effect of appellate Court's order was to reduce the sentence. The wording of S. 423 (1) (b) would cover the case, but if it did not, then it would be covered by that of S. 423 (1) (d) which authorises an appellate Court to make any amendment or consequential or incidental order that might be just or proper : ('38) 25 A.I.R. 1938 Cal. 439, Ref. [P 238 C 2; P 239 C 1]

Cr. P. C. —

('41) Chitaley, S. 423, N. 33, Pt. 22.

('41) Mitra, Page 1351, Para. 1145.

Baldeo Sahay, C. P. Sinha, A. N. Chatterji —
for Appellants.

Yasim Yunus for Govt. Advocate with K. K. Sinha and Medni Prasad Singh —
for the Crown.

Meredith J. — This is an appeal by twenty persons, who have been convicted and sentenced by the learned Sessions Judge of Monghyr under various sections. I shall give the details of the convictions and sentences when I come to deal with the individual cases. Here it will suffice to say that all the appellants have been convicted under either S. 148 or S. 147, Penal Code, and also under S. 325 read with S. 149. In addition the appellants Mahathi Chaudhury, Bhado Chaudhury, Kari Rai, Harni Rai and Jangi Rai have been substantively convicted under S. 324. Thirty-nine persons in all were on trial, but the learned Judge acquitted nineteen of them.

The case was the result of a riot, which took place at about 8 to 8.30 on the morning of 14th June 1944 on plot 1829 of village Nayatola, two miles from Kharia police station. In the course of that riot four persons on the side of Sukhdeo Chaudhry (P. W. 9), the first informant, received injuries. One of them Debu subsequently died from a fractured skull said to have been caused by a blow inflicted by one Rambhaju, who was not on trial with the rest as he was an absconder. The other three men Harakh Chaudhry (P. W. 8), Sukhdeo Chaudhry (P. W. 9), and Ambika Chaudhry (P. W. 22) received a number of simple injuries.

Plot 1829 is situated on the south bank of the Gandak. During the course of years the river Gandak has retreated northwards so that lands have gradually accreted to plot 1829 and the surrounding plots so as to convert them into long stripe running up to the present river bank on the north and consisting

largely of alluvial lands called locally *barari* as opposed to the old survey portion of the plots called *karari*. At the time of the survey the area of plot 1829 was only 10 *kathas*, but it is now much more. Sukhdeo Chaudhury is said to have purchased practically the whole of the plot in 1943, and what he purchased was 1 *bigha* 18 *kathas* from one Nageshwar and 1 *katha* from a man called Umakant. According to the prosecution, there had been bad feeling between Sukhdeo Chaudhury and his cousin and next-door neighbour the appellant Pardip for some years. It is unnecessary to go into the reasons put forward for this enmity, because it was not denied by the defence that the two were at enmity. Amongst those reasons, however, was said to be a dispute with regard to the eastern boundary of the *barari* portion of plot 1829. The plot immediately to the east, 1833, belongs to Pardip. It is the case of both sides that the boundary between the two in the *barari* portion was necessarily somewhat vague as the whole area went under water each rains and fresh silt was deposited. The dispute was said to have been settled by *punches* some time before the occurrence, one of the *punches* being Acchutanand, Pardip's father, and another being Mahabir Chaudhury (P. W. 4). The *punches* made some demarcation of the boundary, but it did not apparently finally settle the dispute. According to the prosecution, Pardip also had wanted to purchase plot 1829 but had been outbid by Sukhdeo, and consequently was anxious to take possession of the whole plot. That has not been established, and the question is not of importance because there was undoubtedly a dispute with regard to the boundary, and that in itself was enough to lead to the occurrence. At the time of the riot sweet potatoes (*alua*) stood in both plots. According to the prosecution, Sukhdeo had decided to dig the potatoes on the morning in question, and his brother Harakh together with his *bataidar* Misri Kandu, who occupied a small portion on the west of the plot went there and started to dig the potatoes from the west. Early that morning the *dafadar*, Ganga Singh (P. W. 7), received information that Pardip and his men were going to commit an assault, and he consequently sent off the *chaukidar* (P. W. 6) who arrived at the *thana* at 9 A. M. and lodged information recorded as a *saneha* (Ex. 3) to the effect that there was an apprehension of a breach of the peace between Pardip Chaudhury and Sukhdeo Chaudhury.

The *dafadar* also directed both Sukhdeo and Pardip not to commit any breach of the peace pending the arrival of the police, but whereas Sukhdeo was amenable, Pardip was recalcitrant and told him he was determined to assault the other party. The Sub-Inspector receiving the information hurried to the spot and got there at about 9-30 A. M. but by that time the riot had taken place. What happened was, according to the prosecution witnesses, that Pardip and a large armed mob came up to the field from the west, started to uproot some of the potato plants near the eastern *al*, and on a protest by Harakh assaulted him. Sukhdeo and his relatives came up, and were also assaulted. There was no counter assault, and it is conceded that no one received any injury on the side of the appellants.

The Sub-Inspector on arrival at the spot found the four injured men lying in the field. Sukhdeo was able to speak, but the other three were not, and he accordingly recorded a *fard-i-beyan* on the statement of Sukhdeo, and then sent all four off to the hospital. He found the bodies lying two or three paces west of the eastern *al*, about 25 paces northwards from the southern *al*. Round about he found trampling and some *alua* creepers uprooted, but 15 paces to the west, that is to say, towards Misri's portion of the plot he found potatoes lying which had been dug up in the ordinary manner.

At the trial ten eye-witnesses were examined, four of whom (P. Ws. 4, 18, 19 and 20), besides the three injured men (P. Ws. 8, 9 and 22), were named in the first information. The three additional eye-witnesses are P. Ws. 16, 17 and 23. These people have all described the attack by the mob and given various details as to the weapons with which the members of the mob were armed and the individual assaults committed by them.

The defence was two-fold, in the first place, that none of the appellants took part in the occurrence, and in the second place, that if they did they were not trying to take possession of the whole of plot 1829, but merely to prevent the prosecution party from trespassing into plot 1833 across the boundary of the *barari* portion and uprooting the *alua* which belonged to Pardip.

Mr. Baldeva Sahay, who has argued the appeal for the appellants, concedes that he cannot establish affirmatively that the accused had any right of private defence, because the defence made no attempt to establish that Harakh or Misri had trespassed across the boundary, or had up-

rooted any *alua* which had been grown by Pardip. Therefore, he conceded that if the evidence regarding individual assaults be accepted he could not contest the correctness of the convictions of those who had been substantively convicted under S. 324; but he argued that the boundary being vague and uncertain, if the defence would not establish affirmatively a right of private defence, for the very same reason the prosecution could not establish affirmatively the existence of an unlawful common object. Therefore, the convictions for rioting and under S. 325 read with S. 149 could not be supported, and except those in respect of whom it was established that they committed individual assaults, all the appellants must be acquitted. Unfortunately for the appellants this argument proceeds upon two assumptions neither of which appears to be correct. The first is that the unlawful common object charged against the mob was to dispossess Sukhdeo of his land, and the second is that the assault took place on the *barari* portion where the boundary was indistinct. As regards the first, an examination of the charge shows that dispossession was only put in as the secondary object. The primary object of the mob in the charge was described as committing hurt or grievous hurt. Upon the evidence it is extremely difficult to hold that this common object was not established. The object of the mob was undoubtedly to assault and injure the men of Sukhdeo. No other inference from their conduct is possible, and there is nothing in the case which could support a finding that there was any legal justification for committing such an assault. As for the second assumption, the evidence seems to me to leave no doubt that the assault took place in the *karari* portion, and not the *barari*, and at the time no potatoes were being uprooted by any one in the *barari* portion where there was a boundary dispute. This cuts away the entire basis of Mr. Baldeva Sahay's argument, and it is a vital point in the case. The evidence of the Sub-Inspector, to my mind, leaves no possible doubt as to the locality of the assault. He says, as I have already noticed, that the bodies and trampling were three paces west of the eastern *al* and about 25 paces from the southern *al*. A survey trained sub-inspector, known for some obscure reason in the police office as a "Building Sub-Inspector," was deputed to make a map, and he has testified that he made measurements and he found that the *karari* portion extended

northwards for 31 yards from the southern *al*. Twenty-five paces northwards must, therefore, be within the *karari* portion. Mr. Baldeva Sahay relies strongly upon a statement of the Sub-Inspector that the scene of occurrence was also about two *rasis* south of the Gandak. He points out that some of the witnesses have said that the entire length of the plot was $3\frac{1}{2}$ *rasis* and, therefore, he argues the occurrence took place $1\frac{1}{2}$ *rasis* north of southern *al*, which would be in the *barari* portion. These estimates in *rasis* are only approximate. Unfortunately for the argument the Sub-Inspector went on to explain that by two *rasis* he meant 200 or 250 paces. The Building Sub-Inspector measured the entire length of the plot north to south, and found it 230 yards. There is, therefore, really no contradiction in the two statements of the Sub-Inspector. If the occurrence took place 250 paces from the river bank and the entire plot only extended 230 yards to the south, it is obvious that the occurrence was very near the southern limits of the plot. Independently of this police evidence, which to my mind is conclusive, there are definite statements by two witnesses that the *marpit* took place on the *karari* and not on the *barari* land. Mahabir (P. W. 4), who it will be recalled was one of the *panchas*, definitely states that the *marpit* took place on the *karari* land 10 or 15 *laggas* north of the southern boundary of plot 1829. Harakh (P. W. 8) says that the *marpit* was on the survey plot or *karari* land. Mr. Baldeva Sahay as against this cites a statement of P. W. 19 who said that he saw the injured persons being put on a boat at a place one *rasi* from the place of assault. This statement proves nothing, as there is no evidence of the position of the boat. That question was not asked. It cannot be assumed that the boat was necessarily in the main stream. There are frequently side inlets in which boats are kept. Secondly, he cites the statement of the *dafadar* who at one portion of his cross-examination said: "The bodies were lying in the accreted portion." There seems reason to believe, however, that the *dafadar* had merely been confused by the cross-examination, because very shortly afterwards he said: "I do not know whether the *marpit* was on *barari* or *karari* land." The *dafadar* had stated that he witnessed the assault from a long distance, 5 or 6 *rasis*, and though at the trial he said that after the assault he went to the spot, before the Committing Magistrate he said that he did not go to the spot even after

the mob had left. This solitary statement of the *dafadar* does not, in my opinion, in any way shake the evidence which conclusively establishes that the *marpit* took place in the *karari* portion. The defence has challenged the prosecution version that potatoes were actually being dug on the western sides at mistry plot. The statement appears in the first information recorded very promptly after the occurrence and is supported by the Sub-Inspector's evidence as to where he found the digging had been going on, that is, 15 paces to the west of where the injured men were lying. But it makes no difference whether the prosecution is strictly correct on that point or not, because it is nobody's case that any potatoes were being uprooted by the prosecution party on the eastern side of the *al* in the *karari* portion, nor is it anybody's case that there was any dispute with regard to the boundary in that portion. If the Sub-Inspector found some traces of hurried uprooting near the eastern *al* he is definite that it was some paces to the west of the eastern *al* and, therefore, within plot 1829. What he found seems to support the prosecution story that the mob attempted hurriedly to uproot some creepers at that point, and, of course, they had no justification whatever for doing so.

In my opinion the existence of an unlawful common object on the part of the mob was amply established. The only remaining questions are as to the presence of each of the appellants, and in the case of some of them as to what part they took in the affair. I, therefore, turn to the individual cases. I may say at once that the learned Judge adopted a rather mechanical standard for judging the evidence. He convicted those identified by at least six witnesses and with two exceptions acquitted those identified by five or less. This is not the way to estimate evidence in cases like this. There is no virtue in a multiplicity of witnesses if once it is found, as the Judge found, that most of them were interested. The Judge himself felt that the course he had adopted was unsatisfactory, but observed that there was no way out of the dilemma. In my opinion, however, it is possible to avoid that dilemma. Before dealing with the individual cases, it is necessary to notice that there can be little doubt that the net was cast too wide by the prosecution in this case. There is strong reason to believe that some at least of the accused were implicated not because they were seen to take

part but because they were relatives of Pardip. No less than eight old men of over 60 were implicated as members of the mob. One of them was a man of 75, and another of over 70. No less than 40 in all were said to have been identified, including the absconder already referred to. It is difficult to believe that the witnesses could really have identified so many. A very strict standard has, therefore, to be adopted in weighing the evidence against each accused. (Then after dealing with the cases of Pardip, Mahathi, Silo, Bhumi, Bhado, Bangali Rai, Bishundeo Rai, Mudo Rai, Ram Prasad Rai, Bilas Rai, Thakur and Bhada Rai his Lordship proceeded). Kari Rai — The Judge has sentenced him to three years' rigorous imprisonment under S. 324 for assaulting Harakh. In my opinion, he was not justified in doing so. Only two witnesses, Harakh himself (P. W. 8) and Ambika (P. W. 16) attributed this assault to him, but the learned Judge omitted to notice that Harakh himself had not done so before the police, leaving only a single witness to testify to the point out of seven witnesses who identified him as a member of the mob. The conviction under S. 324 must, therefore, be set aside, but the conviction under S. 148 should, in my opinion, stand. Though he was not mentioned in the first information, I have no doubt he took part because, besides the six other witnesses who have identified him, he was one of those identified by the *dafadar* (P. W. 7). I would, therefore, set aside Kari's conviction under S. 324, but maintain that under S. 148, and as the sentence of three years under S. 324 has to go and the learned Judge stated that he imposed no separate sentence under S. 148 because he considered that three years was sufficient, I would impose a sentence of 18 months' rigorous imprisonment under S. 148. Mr. Baldeva Sahay raised some question as to whether that could legally be done. It would be a grave anomaly if when an appellate Court has found that a man has been rightly convicted for a serious offence it has to let him go scot-free merely because the trial Court has imposed the sentence under a wrong section. In my opinion, that is not the law. I think the appellate Court has ample power to transpose the sentence so long as the transposition does not amount to an enhancement. The wording of S. 423 (1) (b) will, in my opinion, cover the case, but if it does not, then it will be covered by that of S. 423 (1) (d), which authorises an appellate Court to make any amendment or

consequential or incidental order that may be just or proper. If any authority be needed it is found in *Superintendent and Remembrancer of Legal Affairs, Bengal v. Hussain Ali* (A.I.R. 1938 Cal. 439.¹) The effect of what I am proposing in the present case is to reduce the sentence upon Kari from three years to eighteen months' rigorous imprisonment. (Then dealing with the cases of Rajpati Rai, Sital Rai, Kasi Rai, Harni Rai, Kamli Rai, Shanti Rai and Jangi Rai his Lordship concluded). I would dispose of this appeal as I have detailed above in the case of each appellant. I have criticised the findings of the learned Judge in certain instances, but it must not be thought that I do not appreciate the careful and thorough manner in which he conducted the trial.

Imam J. — I agree.

V.R./D.H. *Order accordingly.*

1. ('38) 25 A. I. R. 1938 Cal. 439 : 175 I. C. 799.

[Case No. 93]

A. I. R. (33) 1946 Patna 239

MEREDITH AND IMAM JJ.

Haria Dusadh and another
Appellants

v.

Emperor.

Criminal Appeal No. 137 and Cri. Revn. No. 544 of 1945, Decided on 17th September 1945, from order of Addl. Sessions Judge, Bhagalpur, D/- 12th December 1944.

(a) Criminal P. C. (1898), S. 439 — Original sentence served out by accused — High Court can enhance sentence.

It is within the power of the High Court to enhance a sentence of an accused person although he has served out his original sentence and has been discharged from jail custody. The question whether such power should or should not be exercised depends upon the circumstances of each case: ('20) 7 A.I.R. 1920 Lah. 213; ('26) 13 A.I.R. 1926 Bom. 256 and ('28) 15 A. I. R. 1928 Lah. 961, *Rel. on.* [P 242 C 1]

The accused was convicted under S. 412, Penal Code, and sentenced to six months' rigorous imprisonment :

Held that the sentence of six months' rigorous imprisonment for a conviction under S. 412, Penal Code, was wholly inadequate and should be enhanced to five years even though the original sentence had been served out, in the circumstances of the case. [P 241 C 2]

Cr. P. C. —

('41) Chitaley, S. 439, N. 29, Pt. 8; N. 23, Pt. 9.

('41) Mitra, S. 439 : Note 'Power to enhance sentence' Page 1449.

(b) Criminal trial—First information report — Failure to mention name of witness in — Effect.

The failure of the informant to mention a witness's name in the first information report must be kept in mind by the Court, but is not in itself a sufficient ground for rejecting the testimony of the witness unless the Court could be sure that the witness had some motive for deposing against the accused. [P 240 C 2]

Cr. P. C. —

('46) Chitaley, S. 154, N. 9, Pts. 12, 13.

S. Asghar Husain — for Appellants.

S. C. Chakravarty for Government-Advocate
— for the Crown.

Imam J.—In this appeal there are two appellants, *Haria Dusadh* and *Sabru Mian*. *Haria Dusadh* was convicted by the Additional Sessions Judge of Bhagalpur under S. 395, Penal Code, and sentenced to two years' rigorous imprisonment and a fine of Rs. 50, in default three months further imprisonment. *Sabru Mian* was convicted under S. 412, Penal Code, and sentenced to undergo rigorous imprisonment for six months. At the time the appeal was admitted by this Court a notice was issued upon the appellants to show cause why their sentences should not be enhanced.

Village Sarmania is 12 miles from the police-station Colgong, and it is at this village that the prosecution alleged a dacoity was committed some time after mid-night of 27th April 1943 in the house of one Hansi Koeri. In the course of the dacoity several articles were removed, including utensils and grains. The dacoits also assaulted two persons, namely, Debi and Ghoghan, who were stopping at the place of Hansi Koeri. These men had come to the latter's house to act as bearers presumably to carry a *palki* in which the complainant intended to send his ailing daughter to her husband's place in village Gazichak, 3 or 4 *koses* from village Sarmania. The dacoits, it appears, who were well armed, inflicted very severe injuries on Debi so much so that he was for some time unconscious. The medical evidence would tend to support the allegation of Debi that he had been mercilessly assaulted by the dacoits and that he had consequently lapsed into unconsciousness. Debi Kahar had as many as ten injuries on his person, and Ghoghan eight. The dacoity at the house of Hansi Koeri was not seriously questioned before us, and having regard to what the Sub-Inspector found when he arrived at the house of Hansi Koeri, there cannot be the slightest doubt that a dacoity was in fact committed in the complainant's house and that there is no reason to suspect the evidence in the case led in that respect.

Before a first information report was lodged at the police-station concerning this

dacoity one Bhima Dhangar was produced before the Sub-Inspector at police-station Colgong by certain *chaukidars*, and a *saneha* was recorded with reference to it. It appears that some 15 *chaukidars* including one Basanta Dusadh were returning from the police-station after receiving their salaries. When they had reached village Kujha they decided to check the attendance of certain bad characters in that village. They found that this Bhima Dhangar was absent from his house, and accordingly they so posted themselves in order to apprehend this man when he returned to his house. Somewhere about dawn Bhima Dhangar was seen coming when he was challenged by the *chaukidars* who arrested him there and then, and thereafter took him to the police-station where they arrived at about 10 A. M., on 28th April 1943. The first information was lodged by Hansi Koeri at 6 P. M. on 28th April 1943, at the police-station. It would appear from the evidence that the police left the thana somewhere about 2-30 A. M., on 29th April 1943, accompanied by Bhima Dhangar. The party then proceeded to village Kujha, where the Sub-Inspector left this individual in the charge of certain police officials in order to make a search in certain houses, and the Sub-Inspector himself proceeded to village Amdanda. The Sub-Inspector on arrival at Amdanda searched the house of Haria Dusadh at 7 A. M. in the presence of certain witnesses from where he recovered two *lotas* and a *thali*. Haria Dusadh, who was present at the time of the search, was then arrested. The Sub-Inspector then proceeded to village Sarmania, where he reached somewhere about 10 A. M. After having inspected the place of dacoity and after having examined certain witnesses he again left for village Amdanda at 4 P. M., on 29th April 1943. He reached Amdanda at 5.30 P. M., where he searched the house of Sabru Mian in the presence of witnesses, and recovered one *Kalsi* and a *lota* and half a seer of *Mirchai*. He returned to the police-station on 30th April 1943, from where he forwarded Bhima Dhangar to the Sub-divisional Officer, Bhagalpur, in order that his confession may be recorded. On 1st May 1943, the Sub-Inspector returned to village Sarmania, when he examined a number of persons, including P. W. 11, Ratan Beldar.

A test identification parade was held by an Honorary Magistrate, Rai Bahadur Gajadhar Prasad Sao (P. W. 2), at his bungalow at Colgong, on 17th May 1943. At this

parade the articles which were recovered from the houses of Haria Dusadh and Sabru Mian were put up for test identification. Sabru Mian was ultimately arrested on 14th November 1943. The trial was held with the aid of four assessors, who were unanimously of the opinion that Bhima Dhangar was guilty, and that the appellants Haria Dusadh and Sabru Mian were not guilty. The Additional Sessions Judge acquitted Bhima Dhangar, but convicted the appellants.

I have already held that a dacoity was committed in the house of Hansi Koeri at village Sarmania, and it now remains to be considered as to whether the evidence against the appellants is satisfactory. Haria Dusadh was identified by P. W. 11, Ratan Beldar, as one of the dacoits who had attacked the house of Hansi Koeri. The only ground on which his evidence has been rejected by the learned Judge was that his name was not mentioned in the first information report as having identified this appellant, although Ratan Beldar states in his evidence that immediately after the departure of the dacoits he had told Hansi Koeri and his son Bengi Koeri that he had identified the appellant. This witness, as I have already stated, was examined by the Sub-Inspector on 1st May 1943. There is nothing to show as to why this witness should depose falsely against the appellant. It is true that the witness's name is not mentioned in the first information report as one of the villagers who had identified the appellant. The omission to mention the witness's name in the first information report may be due to various reasons over which the witness had no control. It may be that Hansi Koeri was a person of a confused mind and weak memory. The failure of Hansi Koeri to mention Ratan Beldar's name in the first information report must undoubtedly be kept in mind, but is not in itself a sufficient ground for rejecting the testimony of Ratan Beldar, unless one could be sure that this witness had some motive for deposing against the appellant. It is significant that Hansi Koeri stated in cross-examination that Singhoo Koeri, Ramdhani Goala and Chhattri Koeri were the persons who had turned up first before him after the dacoity, and the cross-examiner put him the question as to whether he recollected the names of the other *basti* people who arrived at his house after the departure of the dacoits. Hansi Koeri replied: "How many names can I remember." Speaking for myself, I do not think I can

share the view taken by the learned Judge in rejecting the testimony of Ratan Beldar. As I have already said, there is no adequate motive proved in the case as to why he should depose against the appellant. The Sub-Inspector had reached village Sarmania somewhere about 10 A. M., on 29th April 1943. He had obviously received some information, after having inspected the place of occurrence and examined some of the witnesses, which led him to go back to Amdanda to make further searches in the houses of certain persons in that village. He had already been in village Amdanda that morning before he went to village Sarmania, and I can only conclude that his information, whatever it was, must have been of an urgent nature which induced him to stop further investigation at Sarmania and proceed to Amdanda. On 30th April 1943, the Sub-Inspector was at the police-station busy with various works and did not go to Sarmania again till 1st May 1943. The little delay in examining Ratan Beldar must, therefore, be ignored, and there is nothing to show on the record that Ratan Beldar made a different statement from that which he had made in Court concerning the participation of the appellant in the dacoity. I would, therefore, rely upon the evidence of this witness against this appellant. (Then after discussing further evidence his Lordship came to the conclusion that Haria Dusadh was guilty under S. 395, Penal Code, and Sabru Mian under S. 412 of the Code.)

As to the rule for enhancement of the sentences, I would say in the clearest possible terms that the learned Judge completely failed in imposing an adequate sentence for the offences committed by the appellants. I cannot understand under what process of reasoning the learned Judge thought that two years and Rs. 50 fine was sufficient punishment for the offence of dacoity, particularly when one knows that Debi Kahar was mercilessly assaulted. In normal times the standard of punishment for the offence of dacoity was hardly ever less than five years, and it has been pointed out by this Court for many months that the rise in dacoity in the province called for deterrent sentences. In my judgment, the sentence on Harihar Dusadh ought to be enhanced to at least seven years' rigorous imprisonment.

In the case of the appellant Sabru Mian, the sentence of six months' rigorous imprisonment for a conviction under S. 412 is again, to my mind, wholly inadequate. A question, however, arose as to whether in

the case of this appellant the sentence should be enhanced in view of the fact that he had already served his sentence and had been discharged from jail for some three months at least. The judgment of the Additional Sessions Judge was delivered on 12th December 1944, and the appeal was presented to this Court on 9th February 1945. Normally the appeal should have come up for admission on 12th February 1945, but on 9th February, at the request of the advocate for the accused two weeks' time was given before the appeal was put up for admission. The appeal came up for admission on 23rd February, and here again at the request of the learned advocate for the appellant the appeal for admission was postponed till 5th March 1945. The appeal was put up for admission on 6th March 1945, and this Court while admitting the appeal issued notices of enhancement on the appellants. It is, therefore, quite clear that in any event in spite of something like a month's delay caused by the appellants' counsel before the appeal was admitted this Court issued the rule while the sentence on the appellant still prevailed and the appellant had yet not served out his sentence. It is true that since the admission something like six months elapsed before the appeal was actually set down for hearing, but that has been largely due to the congestion of work in the Court. In normal circumstances the appeal would have been heard in all probability before the sentence of Sabru Mian had been served out by him. The point in issue is as to whether the appellant having served out his sentence it is within our power to enhance his sentence. I am quite satisfied on reading the decisions in 1 Lah. 453,¹ A.I.R. 1926 Bom. 256² and A.I.R. 1928 Lah. 961³ that it is within our power to enhance a sentence on an accused although he may have served out his original sentence and have been discharged from jail custody, provided the case calls for such an enhancement. It is perfectly true that the power of enhancement is exercised by the Court with reluctance and on rare occasions, but there are times when one is compelled to exercise the powers the Court possesses to inflict what should be the proper sentence in a case. For example, an accused may be tried before a Sessions Judge for murder, but is ultimately convicted for culpable homi-

1. ('20) 7 A. I. R. 1920 Lah. 213; 1 Lah. 453: 56 I. C. 861, Emperor v. Jagat Singh.

2. ('26) 13 A. I. R. 1926 Bom. 256: 93 I. C. 1053, Emperor v. Shankar Narayan.

3. ('28) 15 A. I. R. 1928 Lah. 961; 114 I. C. 72, Emperor v. Shahzad Ahmad.

cide not amounting to murder and the Judge for apparently inadequate reasons inflicts a sentence of one day's imprisonment and some fine. In any event such a case could not possibly come to the notice of the Court until long after that one day's imprisonment had been served out by the accused. I decline to think that this Court will be so powerless as not to enhance the sentence if it considered that a wholly inadequate sentence of imprisonment had been imposed. I have no doubt in my mind that in law we have the power to enhance the sentence although the original sentence has been served out by an accused person. As to whether one should or should not depend upon the circumstances of each case. In this particular instance I am quite convinced that Sabru Mian should receive a much severer sentence than he received at the hands of the learned Judge. Receivers of stolen property are the greatest source, in my opinion, of encouragement to dacoits, and in the case of this appellant such a recent possession after the dacoity inclines me to think that if he was not actually one of the dacoits himself, he must have been in very close contact with them to have been the recipient of the stolen property within 40 hours of the occurrence. In my judgment, the sentence of Sabru Mian should be enhanced, and nothing less than five years' rigorous imprisonment would meet the ends of justice.

I would accordingly enhance the sentence of Haria Dusadh to seven years' rigorous imprisonment, but would set aside the sentence of fine of Rs. 50, and of Sabru Mian to five years' rigorous imprisonment. The appeal is accordingly dismissed and the rule made absolute.

Meredith J. — I agree.

V.W./D.H.

Order accordingly.

[Case No. 94.]

A. I. R. (33) 1946 Patna 242

SHEARER AND PANDE JJ.

Ram Charan Rai and others
Appellants

v.

Emperor.

Criminal Appeals Nos. 340, 341, 378 and 404 of 1945, Decided on 8th October 1945, from order of Sessions Judge, Muzaffarpur, D/- 5th April 1945.

(a) Penal Code (1860), S. 34—Accused being one of several persons taking part in brutal attack on deceased causing death—Accused is guilty of murder—S. 34 applies.

Several persons armed with *pharsas* and *bhalas* attacked an old man of sixty-five and caused his

death and it was proved that the accused was armed with a *bhala* and was one of those who took part in the attack. There were three wounds any one of which was sufficient to cause the death of the old man :

Held that it was wholly immaterial whether the accused was directly responsible for any of the three wounds. Any one who took part in the attack was quite clearly guilty of murder, as the attack was so brutal and violent a one that an intention to cause death on the part of all who were concerned in it must be presumed. The provisions contained in S. 34, Penal Code, clearly applied. [P 245 C 2]

Penal Code —

('45) Ratanlal, Page 65, Pt. 3.

('36) Gour, Page 192, Pt. 18.

(b) Penal Code (1860), S. 34—Accused, a boy of twelve striking deceased with lathi after he fell down due to mortal blows with *bhalas* and *pharsas* delivered by other persons—S. 34 held did not apply and accused not constructively guilty of murder.

An old man of sixty-five was mortally assaulted with *bhalas* and *pharsas* by several men. The accused, a boy of twelve, dealt a *lathi* blow to the old man after he fell down. It was in evidence that the old man died instantaneously:

Held that the accused was not constructively guilty of murder by reason of the provisions contained in S. 34, Penal Code, because it was possible that the old man was already dead when the accused struck a *lathi* blow, and secondly, even if life was not yet extinct the fatal assault was already over and the accused could not be said to have participated in it and such injury as the accused subsequently caused could not, in any way, have accelerated or contributed to the death of the old man. [P 245 C 2]

(c) Penal Code (1860), S. 149—Person constructively found guilty under S. 149 must be found guilty of same offence as principal offender : ('36) 23 A.I.R. 1936 Pat. 481, *Dissent*.

It is clear from S. 149 itself that if a member of an unlawful assembly is to be found constructively guilty of an offence under S. 149 it must be the same offence of which the principal is guilty and not some other offence : ('23) 10 A.I.R. 1923 Pat. 50, *Foll.*; ('36) 23 A.I.R. 1936 Pat. 481, *Dissent*. [P 246 C 1]

(d) Penal Code (1860), S. 149—Section creates no offence but is merely declaratory of principle of English common law.

Section 149, Penal Code, creates no offence but is merely declaratory of a principle of the English common law. That principle is that in a riot all are principals, the rioter, who with his own hand commits the offence being a principal in the first degree and the other rioters being principals in the second degree on the ground that by their presence they have aided and abetted the doing of the act : 9 All. 645, *Foll.* [P 246 C 2]

(e) Penal Code (1860), S. 149 — Knowledge beforehand of offence likely to be committed is necessary—Knowledge how collected.

Under S. 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence

actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise.

[P 250 C 2]

Penal Code —

(45) Ratanlal, Page 348, Pt. 18.

(36) Gour, Page 519, Para. 1419.

(f) Penal Code (1860), S. 149—Second part of section—Test for applicability, stated.

In considering whether the second part of S. 149 applies the question to be asked is, was the nature of the enterprise such that every member of the unlawful assembly ought to have realised that the offence was likely to be committed. [P 248 C 1]

The members of an unlawful assembly of about 100 persons had gone to the scene to obtain possession of certain land illegally. There were on the land an old man and his son and a handful of labourers, who did not evince any intention to remain on the land and fight it out. Some members of the assembly, however, got excited and murdered the old man:

Held that in the circumstances of the case it could not be said that every member of the unlawful assembly knew or ought to have realised that there was a likelihood that some of their number would commit murder and hence the second part of S. 149 was not applicable.

[P 248 C 2]

Mrs. Dharamshila Lall and K. P. Varma —
for Appellants.

Standing Counsel — for the Crown.

Shearer J.—These appeals, which have been heard together, arise out of a judgment of Khan Bahadur Muhammad Ibrahim, the Sessions Judge of Muzaffarpur, convicting six men of rioting and murder. The riot in which they are said to have been concerned took place on 18th September 1942, and shortly afterwards a number of men were arrested and in due course put on trial before the then Sessions Judge, Rai Bahadur Aghore Nath Banarji. Most of these men were convicted and an appeal against their convictions and sentences was dismissed by Sinha and Beevor JJ., on 9th February 1944. The present appellants had absconded. One of them, namely, Satnarain Chaudhary, was apprehended on 5th July 1943, that is, shortly before judgment was delivered by Rai Bahadur Aghore Nath Banarji. The other appellants were apprehended much later; most of them not until the middle or latter part of 1944.

The immediate cause of the riot was the action of Pancham Jha and his son Nageshwar Jha and a number of labourers in cutting the *marua* crop standing on a small parcel of land in village Manki, to which the appellant Satnarain and most of the

other appellants belong. This land was originally *bakasht* land, and in 1927 the landlord settled it with one Sia Chaudhary, who is the uncle of the appellant Satnarain Chaudhary. Subsequently, Sheo Parsan Chaudhary, the brother of Sia Chaudhary, took a conveyance of an eight annas interest in the estate in which this land is situated. Immediately afterwards Sheo Parsan Chaudhary mortgaged this property to one Satnarain Singh, the employer of Pancham Jha and Nageshwar Jha, who belongs to another village some considerable distance away from Manki. The mortgage money was not repaid, and Satnarain Singh in due course instituted a suit and obtained a decree in execution of which he had the mortgaged property sold and purchased it himself. The amount realised by the sale was insufficient to liquidate the debt and Satnarain Singh obtained a decree for the balance. In execution of this decree he brought to sale and himself purchased the *raiyati* interest of Sheo Parsan Chaudhary and his brother Sia Chaudhary in the land over which the riot took place.

In the course of the execution proceedings several persons appear to have put forward claims, asserting that they were in possession of the land on their own account and were not liable to be evicted by Satnarain Singh. These claims were, however, dismissed, and Satnarain Singh ultimately succeeded in obtaining possession of the land. Not long after the writ for delivery of possession was served, the insurrection of 1942 began, and in it the police-station at Katra, within the jurisdiction of which Manki is situated, was burnt down. A panchayat board was apparently set up by the insurgents in Berai, a village contiguous to Manki, and on 25th August 1942, this panchayat board presumed to make an award under which Sheo Parsan Chaudhary was to pay the sum of Rs. 3500 to Satnarain Singh, and Satnarain Singh was to reconvey the property he had purchased to Sheo Parsan Chaudhary. The award provided that the payment was to be made within a period of one month and provided further that, if Sheo Parsan Chaudhary was unable to make the payment, he was to have the option of conveying certain land to Satnarain Singh instead. Shortly afterwards, on 14th September 1942, the members of the *panchayat* caused a letter to be sent to Satnarain Singh, requiring or requesting him to abide by the decision they had given. Satnarain Singh and his agent in Manki,

Nageshwar Jha, apparently declined to comply with the wishes of the board. It was, no doubt, in consequence of this that on 18th September 1942, Sheo Parsan Chaudhary collected a mob and went to take forcible possession of the land. As I have already said, Pancham Jha and his son Nageshwar Jha were on the land getting the *marua* crop cut when the mob arrived. Pancham Jha, when asked to quit the land, declined to do so, and thereupon he was attacked and killed. Three of the labourers were also more or less severely assaulted. Neither Mrs. Dharamshila Lall nor Mr. K. P. Varma, who appear for the appellants, has attempted to contend that a riot of a serious kind did not in fact take place.

Indeed, upon the evidence on the record it would be quite impossible to put forward any such argument. Mr. K. P. Varma has, however, attempted to persuade us that two of his clients, namely, Ramcharan Rai and Satnarain Chaudhary, took no part in it and are the victims of a conspiracy. Ram Charan Rai does not belong to Manki but to Berai, and is the son of one Sukhdeo Rai. The latter was apparently one of those men who were tried by Rai Bahadur Aghore Nath Banarji and he was acquitted. Mr. Varma contends that the learned Sessions Judge was in error in relying on the evidence of certain witnesses for the prosecution when his predecessor had disbelieved the evidence of these witnesses in so far as they incriminated his father. There is, in my opinion, little or no force in this argument. For one thing, it would seem that the volume of evidence against the appellant Ram Charan Rai is considerably greater than was the volume of evidence against Sukhdeo Rai at the earlier trial. Certain of the witnesses for the prosecution who had apparently said nothing at the earlier trial against Sukhdeo Rai gave evidence at the subsequent trial against his son Ram Charan Rai. Secondly, from the outset, a fairly prominent and active part in the riot has been ascribed to Ram Charan Rai, but not apparently to his father Sukhdeo Rai. Even in the first information it was said that Ram Charan Rai was one of those who had assaulted one of the labourers, Hazuri Raut, and had carried him away from the scene of occurrence. At this trial Hazuri Raut gave evidence against Ram Charan Rai and stated that he was one of the men who had struck him with *lathis*. Ram Charan Rai, as I have said, belongs to Berai, and the suggestion put forward on his behalf was

that the mahant of Patepur, who is the landlord of Berai, had been responsible for his being incriminated. It is said that Ram Charan Rai had consistently declined to pay rent to the mahant of Patepur and that in consequence the mahant had had to institute a number of rent suits against him. It is also said that relations between him and the mahant had been so strained that the mahant had applied for action to be taken against him under S. 107, Criminal P. C. There is no evidence of this on the record. Even, however, assuming that relations between Ram Charan Rai and his landlord, the mahant of Patepur, had for some considerable time been strained, I can see no reason at all to suppose that that was why Ram Charan Rai came to be incriminated. Berai is quite close to Manki and was the seat of the panchayat board which endeavoured to get Satnarain Singh to surrender this land to Sheo Parsan Chaudhary. There is nothing very unlikely in his having joined the mob which Sheo Parsan Chaudhary collected. Nageshwar Jha may, no doubt, hold some land under the mahant of Patepur, but there is no good reason to suppose that he was amenable to pressure by the mahant of Patepur and would at his instance have incriminated a man whom he knew to be innocent. Moreover, it would seem that Nageshwar Jha took steps to lodge a first information as soon as he possibly could. The police-station at Katra had been burnt down and in consequence Nageshwar Jha had to take the dead-body of his father, Pancham Jha, to Muzaffarpur on a bullock-cart. He reached Muzaffarpur and lodged a first information at 1 A. M., which makes it very unlikely indeed, and in fact almost impossible, that there was any consultation between him and any *amlas* of the mahant of Patepur before he left the village. I am satisfied that the appellant Ramcharan Rai did in fact take part in this riot. The appellant Satnarain Chaudhary is the only son of Sheo Parsan Chaudhary who was the man directly and immediately responsible for the riot. He was apprehended or surrendered on 5th July 1943, and shortly afterwards the Civil Surgeon was asked to report how old he was and stated that, in his opinion, he was fourteen. The learned Sessions Judge and the learned Committing Magistrate were apparently both of the opinion that, when they saw him, he was about fifteen years of age. If these estimates are correct, Satnarain Chaudhary must have been a boy of between twelve and thirteen when the riot

took place. Mr. K. P. Varma says that it is very unlikely indeed that a boy of that age would take part in a riot, and points out that each of the assessors, who was satisfied as to the guilt of the other prisoners, was disposed to acquit him. There is, however, a great deal of evidence against this boy and I agree with the learned Sessions Judge in thinking that it is impossible to reject it in its entirety and to assume that Nageshwar Jha, when he went to the police-station, took it into his head to incriminate Satnarain Chaudhary falsely and maliciously merely because he knew that that would be likely to cause intense suffering to Sheo Parsan Chaudhary whose only son he is.

Pancham Jha was an old man of sixty-five and was most foully and brutally murdered. He was apparently attacked by several men, some of whom were armed with *pharsas* and others with *bhalas*. One of the former struck him a blow on the back, causing a wound $8\frac{1}{2}$ " long and 3" wide and cutting through no fewer than seven of his ribs. One of the latter, who was standing on the other side of Pancham Jha, drove his *bhala* deep into his side, cutting through the seventh rib and puncturing both the stomach and diaphragm. Another man, armed with a *bhala*, drove it into his back deep enough to cause damage to the left kidney. He was struck at least three more blows with *pharsas*, two of them on the head. The appellant Kuseshwar Chaudhary is said to have been responsible for the first of the two blows with *bhalas* which I have just described, and he was in consequence charged substantively with murder. The Assistant Surgeon, who conducted the *post mortem*, had, it should be explained, expressed the opinion that either of the two wounds caused by *bhalas*, or the wound on the back caused with a *pharsa*, was by itself sufficient to cause death. The learned Sessions Judge was of opinion that the prosecution had not succeeded in showing that Kuseshwar Chaudhary was in fact responsible for one of these particular wounds. The learned Sessions Judge was, however, apparently satisfied that Kuseshwar Chaudhary was armed with a *bhala* and was one of those who took part in the attack on Pancham Jha, and it would, I think, be impossible to hold that Kuseshwar Chaudhary was one of the rioters and yet took no part in this attack. I am myself satisfied on the evidence that he did do so. In that view of the matter it is wholly immaterial whether he was directly responsible for any of the three wounds which, in

the opinion of the Assistant Surgeon, was by itself sufficient to cause death. Any man who took part in this attack was, in my opinion, quite clearly guilty of murder, as the attack was so brutal and violent a one that an intention to cause death on the part of all who were concerned in it must be presumed. The provisions contained in S. 34, Penal Code, clearly apply. The appellant Satnarain Chaudhary is said to have struck Pancham Jha a blow with a *lathi*. It is not possible to suppose that this boy joined in the attack on Pancham Jha at the same time as the men who were armed with *pharsas* and *bhalas* fell upon him. In fact, the evidence of Ramgulam Sao and two or three of the other labourers is that this boy did not strike Pancham Jha until he was lying on the ground. Mr. K. P. Varma has pointed out that the Assistant Surgeon who conducted the *post mortem* did not find any lacerated wounds or other injuries, which might have been caused by *lathis*, on the dead-body. It is, however, possible that any outward mark produced by the blow which this appellant struck had disappeared before the *post mortem*. I think the evidence of Ramgulam Sao and the other labourers ought to be accepted and it ought to be held that for some reason or other this boy went over to Pancham Jha as he was lying on the ground and hit him with a *lathi*. That he did in fact do this explains, I think myself, how he came to be incriminated. Is he then constructively guilty of murder in the same way as Kuseshwar Chaudhary is, namely, by reason of the provisions contained in S. 34, Penal Code? In my opinion, he is not, and that for two reasons. In the first place, Nageshwar Jha said that his father died instantaneously, and it is possible that when Satnarain Chaudhary went over to where he was lying and hit him with a *lathi* he was already dead. Secondly, even if life was not yet extinct, the fatal assault was already over. This boy cannot be said to have participated in it, and such injury as he subsequently caused cannot in any way have accelerated or, indeed, contributed at all to Pancham Jha's death.

The question then arises as to whether Satnarain Chaudhary and the remaining appellants, other than Kuseshwar Chaudhary, are guilty of murder under the provisions contained in S. 149, Penal Code. At the original trial the accused persons were charged under S. 302, read with S. 149, Penal Code but they were convicted under S. 326 read with S. 149, Penal Code, and, with the

exception of two or three, who were sentenced to rigorous imprisonment for four or five years, were each sentenced to undergo rigorous imprisonment for two years. Rai Bahadur Aghore Nath Banarji, the learned Sessions Judge, did not set out at length his reasons for taking this course; but it may be presumed that he relied on the decision of Rowland J., with which Varma J., agreed, in 17 P. L. T. 350.¹ Speaking for myself, and with the greatest respect, that decision is, I think, on several grounds open to criticism. In the first place, it is, in my opinion, directly at variance with an earlier decision of a Division Bench of this Court. In 4 P. L. T. 213² a Sessions Judge had convicted one member of an unlawful assembly under S. 302, Penal Code, and had sentenced him to transportation for life, but had convicted the remaining members under S. 304 read with S. 149, Penal Code, and had sentenced them to undergo rigorous imprisonment for five years each. These latter convictions were set aside on appeal on the ground that it was not open to the learned Sessions Judge to convict the remaining members of the unlawful assembly of a minor offence. Coutts J., in dealing with the matter, said this:

"I can find no authority, however, for convicting the principal offender of one offence and the rest of the members of the unlawful assembly of another offence, nor has the learned Assistant Government Advocate been able to refer us to any such case, and it seems to me clear from the section itself that if a member of an unlawful assembly is to be found constructively guilty of an offence under S. 149 it must be the same offence of which the principal is guilty and not some other offence. If the members of an unlawful assembly are not guilty of the same offence as the principal, the only reason why they are not guilty is because they do not come within the terms of S. 149. If then the rest of the appellants are not constructively guilty of the same offence as Ram Prasad, they cannot be found guilty under S. 149 at all."

It is true that in 17 P. L. T. 350¹ no member of the unlawful assembly had been convicted of murder. The reason, however, was that it had been impossible for the prosecution to show who the individuals were who had committed the murder. That murder was committed by one or more members of the unlawful assembly was conceded. That being so, in altering the convictions from one under S. 302 read with S. 149 to one under S. 326 read with S. 149, Penal Code, the Division Bench were doing exactly what

another Division Bench had some years earlier decided could not, in law, be done. Secondly, Rowland J. relied on certain observations of Phear J. in the well-known case in 20 W. R. Cr. 5,³ which, he thought, went to support the view which he put forward. Unfortunately, Rowland J. omitted to quote the observations on which he relied. It is true that Phear J. pointed out that S. 149, Penal Code, had been drawn in such a way that some member of an unlawful assembly might, while the common object of that unlawful assembly was being prosecuted, commit an offence and yet the remaining members might not be constructively liable for it. I cannot, however, myself see that Phear J. went any further than that and what he said was entirely correct. On the other hand, Ainslie J., referring to the concluding words in S. 149, had observed:

"These last words are very stringent. If the section applies, the Court is bound to convict of the particular offence."

Although Phear J. and most of the other learned Judges dissented from the view which Ainslie J. took of the case, none of them made any comment on this remark of his, and Couch C. J. impliedly endorsed it by saying that

"certainly in a case like this, where, if the accused are found guilty they are liable to a sentence of death, if there is a reasonable doubt as to the view with which the gun was fired they ought to have the benefit of it."

Lastly, as Edge C. J. pointed out in 9 ALL. 645⁴ at p. 649, S. 149, Penal Code, creates no offence but is merely declaratory of a principle of the English common law. That principle is that in a riot all are principals, the rioter, who with his own hand commits the offence, being a principal in the first degree, and the other rioters being principals in the second degree on the ground that by their presence they have aided and abetted the doing of the act. When it was sought to make certain rioters liable for an act done by another of their number, a common practice was to set out in the indictment the facts which it was intended to prove and to charge them specifically with having aided and abetted the rioters who did the act. In such cases the jury was often asked to find a special verdict; and when the special verdict was returned, the question that arose was whether or not, on the facts found by the jury, the prisoners were or were not principals in the second

1. ('36) 23 A.I.R. 1936 Pat. 481 : 162 I. C. 563 : 17 P.L.T. 350, Bhagwat Singh v. Emperor.

2. ('23) 10 A. I. R. 1923 Pat. 50 : 1 Pat. 753 : 71 I. C. 113 : 4 P. L. T. 213, Ram Prasad Singh v. Emperor.

3. ('73) 20 W.R.Cr. 5 : 11 Beng. L. R. 347 (F.B.), Queen v. Sabid Ali.

4. ('87) 9 All. 645, Queen-Empress v. Bisheshar.

degree: see the summary of the argument in (1767) 4 Burrow 2073.⁵ If they were principals in the second degree, they were, of course, guilty of the same offence as the principal in the first degree. Not only that, but until comparatively modern and more merciful times, when it became not unusual "to apportion the punishment," to borrow the expression used by their Lordships of the Judicial Committee in an early Indian case, 3 Beng. L. R. 44,⁶ in which this matter was touched on, they were as a rule liable to and, indeed, invariably received, exactly the same punishment. Rowland J. in support of the conclusion at which he arrived, referred to ss. 35, 38 and 110, Penal Code. These sections are also declaratory of principles of the English common law, but principles very different to that underlying S. 149. Section 110 deals with the case of the accessory before the fact who is not himself present at the fact. Now,

"at common law the offence of an accessory before the fact was regarded as so different from that of a principal in the second degree, that where a woman was indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted to be necessary to charge a principal in the second degree with being *present* aiding and abetting." (See Russell on Crimes and Misdemeanors, 8th Edn., Vol. I, page 121.)

Sections 35 and 38 deal with cases in which each of several persons is a principal in the first degree but they commit different offences inasmuch as some have done the act with one knowledge or intention and the others have done it with another knowledge or intention. In England, as far back as 1553, it was settled that where several men combine to kill another man, and some of them are actuated by malice aforethought and others are not, it is murder in the former but manslaughter in the latter: (1816) 1 Plowden 100.⁷ The argument from analogy is always dangerous; and in seeing any analogy between the principles underlying these sections and the principle underlying S. 149, Rowland J., if I may say so with respect, fell into an error. The decision in 4 P. L. T. 213² is, in my opinion, correct, and is, moreover, binding on me unless and until it is set aside by a larger bench. It, therefore, follows that if, in my opinion, the appellants or any of them are guilty under S. 149 of the Code, I

must convict them of murder and cannot impose a lesser punishment than transportation for life. Whether in some cases that sentence is too severe and ought to be respite, is a matter solely for the Crown to consider in exercise of its prerogative of mercy. On the other hand, the decision at the former trial that the members of this unlawful assembly were constructively liable for the act of those who killed Pancham Jha is not *res judicata*. The matter is one which I have to consider for myself and come to my own conclusion. There can be no doubt but that certain members of this unlawful assembly committed murder, and a murder of the most cruel and barbarous kind. Was this murder committed "in prosecution of the common object" which words, as laid down in 20 W. R. Cr. 5,³ must be construed as meaning "with a view to the achievement of the common object?" The common object of the unlawful assembly was to drive Pancham Jha and his son and labourers off the land and to cut and remove the *marua* standing on it. If, when the mob reached the land, certain men in it had refrained from advancing further and others had made a rush at Pancham Jha and his labourers and attacked them, the view which I should have been disposed to take would have been that those men who did nothing had dissociated themselves from further prosecution of the common object, but that all of those who advanced on Pancham Jha and the labourers were constructively guilty of murder. On the evidence, however, it is clear that nothing of this kind actually happened. What appears in fact to have happened is that, when the mob reached the land, some men in it entered into an argument with Pancham Jha. What Pancham Jha said or did does not appear from the evidence, which is, I think, unfortunate; but it is clear that certain men in the mob lost their tempers and leaving the others, advanced on and attacked and killed him. The labourers who were assaulted would seem to have been assaulted subsequently and because they had protested at what had been done to Pancham Jha. Khan Bahadur Muhammad Ibrahim took the view that the appellants were guilty under the first part of S. 149. It cannot be said that this view was an untenable one, but there is, I think, a certain amount of doubt on the point, and of that the appellants ought to have the benefit. If, then, the first part of S. 149 does not apply, are the appellants guilty under the second part?

5. (1767) 4 Burrow 2073, Rex v. John Royce.

6. ('69) 3 Beng. L. R. 44 (P.C.), Ganesh Singh v. Ram Raja.

7. (1816) 1 Plowden 100, Rex v. Salisbury.

Russell on Crimes and Misdemeanors, 8th Edn., Vol. I, p. 119, contains the following:

"It is submitted that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty."

Sir William Oldnall Russell was at one time Chief Justice of Bengal, and it would be interesting to know if this passage is to be found in the earliest editions of his work to which the authors of Penal Code may have had access. In Edn. 7 of the work no authority was apparently cited for the proposition. But, before Edn. 8 appeared, it received the approval of the Court of criminal appeal in (1913) 8 Cri. App. Rep. 198.⁸ It is true that that was not a case of rioting; but the Court of criminal appeal was dealing with the principle of the common law which underlies S. 149, Penal Code. Rai Bahadur Aghore Nath Banarji, differing on this point from Khan Bahadur Muhammad Ibrahim, appears to have thought that the accused persons were liable under Part II of S. 149. What apparently, weighed with him was that certain members of the unlawful assembly were armed with deadly weapons. This is, of course, a circumstance to which some regard must be had; but since the decision in 17 P. L. T. 350¹ there is, I think, a danger of undue weight being attached to it. The evidence does not show that more than a very few men were armed with *bhalas* and *pharsas*, although a larger number would seem to have been armed with *lathis*. My experience of agrarian riots in Bihar is that in almost every mob some men are to be found armed with *bhalas* or *pharsas* and yet that in a great many cases these weapons are not used, or, at any rate, are used in such a way that fatal consequences more frequently than not do not ensue. The question to which, in my opinion, Sessions Judges ought to address themselves in considering whether Part II of S. 149, Penal Code, applies is this:

"Was the nature of the enterprise, to borrow the expression used in (1913) 8 Cri. App. Rep. 198,⁸ such that every member of the unlawful assembly ought to have realised that murder was likely to be committed."

Now, in this particular case a *panchayat* board, set up by the insurgents in the adjoining village, had decided that Satnarain Singh should make over this land to Sheo

Parsan Chaudhary. The mob, it seems to me clear, went to Manki for the purpose of enforcing this award. There were on the land an old man and his son and a small handful of labourers. These men were not armed; and although they displayed a reluctance to quit the land, they did not evince any intention to remain on the land and fight it out. In these circumstances, how can it reasonably be said that every member of this unlawful assembly knew, which must obviously be taken to mean ought to have realised, that there was a likelihood (which, if it does not mean a probability, at least means more than a possibility) that some of their number would commit murder? I have no hesitation myself in answering this question in the negative.

In the result then, I would alter the conviction of Kuseswar Chaudhary from one under S. 302 read with S. 149, Penal Code, to one under S. 302 read with S. 34, Penal Code. I would set aside the convictions of the remaining appellants under S. 302 read with S. 149, Penal Code, and the sentences of transportation for life have been imposed on them. The appellants Ram Charan Rai, Charitar Gope, Jadunandan Raut and Anup Raut are sentenced to undergo rigorous imprisonment for two years each under S. 147, Penal Code. Sat Narain Chaudhary is still a mere boy, and I would reduce his sentence to the period of imprisonment already undergone. Subject, however, to these modifications, I would dismiss the appeals.

Pande J. — I entirely agree and would like to make the following observations.

The appellants have been convicted for the offence of rioting and constructively for the offence of murder of one Pancham Jha under S. 302 read with S. 149, Penal Code. The convictions are based on the following findings of the Sessions Judge:

"(1) That a large number of persons, who were armed with weapons, came up for depriving Satnarain Prasad Singh of the enjoyment of the right of possession of a portion of Plot No. 81 and assaulting Pancham Jha and others and that in prosecution of the common object of the unlawful assembly, of which they were members, they committed rioting.

(2) That the murder of Pancham Jha was committed in prosecution of the common object of the unlawful assembly by one or more of its members and they must have known that the murder was likely to be committed in prosecution of the common object of the unlawful assembly."

The evidence shows that Plot No. 81 which is the scene of the occurrence, originally formed part of a *raiya* holding of

8. (1913) 8 Cri. App. Rep. 198, Rex v. George Edward Pridmore.

Sheo Parsan Chaudhary of village Manki. The holding had passed into the possession of Sat Narain Singh by purchase in execution of his decree at a court-sale and he had obtained delivery of possession of it through Court. It has been found by the Sessions Judge that Sat Narain Choudhury has been in possession of the land and had grown *marua* crop in the field. About the time of the occurrence Pancham Jha, his son Nageshwar Jha were engaged in harvesting the crop with the help of five labourers. Sheo Parsan Choudhary went to the field with a big mob which is said to be of about 100 persons and four of these were armed with *bhala* and *garassa* and the rest with *lathis*. Sheo Parsan asked the men to stop harvesting. Pancham refused to comply and apparently there ensued altercations between the two. Pancham was very brutally struck by sharp and pointed weapons in consequence of which he died in the field. It is for this offence of killing that the appellants have been convicted under S. 149, Penal Code. It seems clear from the evidence that the main object of the unlawful assembly was to drive Pancham and his labourers off the field and to cut away the standing crop, obviously with a view to assert right of possession over the field. There is nothing in the evidence to show that Pancham or his men engaged in reaping, were in any way armed. The field in question is in mouza Manki. Sheo Parsan Chaudhary and the members of the mob are residents of mouza Manki and the adjoining mouza Berain. The members of the assembly must be well aware that only seven unarmed men engaged in reaping were to be driven off the field. In the circumstance, there was little likelihood of any effective resistance by the men in the field and so no violent use of arms could be in contemplation of the members of the assembly. It is not clear from the evidence what led some members of the assembly to strike Pancham to death. Possibly Pancham's insolent behaviour or recalcitrant attitude might have enraged some easily excitable members of the assembly to commit such brutal assaults on Pancham. At the post mortem examination six injuries were found on the body of Pancham Jha and of these four were incised wounds and two were punctured wounds. The nature of injuries indicate that the men armed with *garassa* and some of these armed with *bhala* struck him. The question is whether in this state of evidence all other members of the unlawful assembly are liable

for the offence of murder under S. 149, Penal Code. As was pointed out by a Full Bench of the Calcutta High Court in the well-known case in 20 W.R. Cr. 5,⁹ S. 149, Penal Code, is not intended to subject as member of an unlawful assembly to punishment for every offence which is committed by one or more of its members during the time they are engaged in prosecution of the common object. In order to bring a case within S. 149 the Act must be done with a view to accomplish the common object of the unlawful assembly, or it must be proved that the offence is one which the accused knew would be likely to be committed in prosecution of the common object. The principle of law on the subject is stated in Russell on Crimes thus :

"If a murder is committed in prosecution of some unlawful purpose, all persons who went to give assistance, if need were, in carrying the unlawful purpose into execution, are guilty of murder. But this applies only where the murder is committed *in prosecution of some unlawful purpose*, in which the combining parties *united*, and for the effecting whereof they are assembled; for unless this appears, though the person giving the mortal blow may himself be guilty of felonious homicide, yet the others who came together for a different purpose will not be involved in his guilt:" (8th Edn., p. 116).

The case in 5 Bom. L. R. 1023⁹ may be referred to in illustration of the principle. In that case the rioters first attacked M and it was not until B and after him T had arrived on the scene and had expostulated or interposed that some of the rioters, of whom the appellant was not proved to be one, spontaneously attacked B and T and killed them. Their Lordships Sir Lawrence Jenkins C. J. and Aston J. observed that if the common object was to kill B or T, the attack upon them would hardly have been deferred until B and T interposed. And on a consideration of the evidence their Lordships came to the conclusion that there was a common intention, in which the appellant shared, to inflict grievous hurt on M and such hurt was actually inflicted. It was, therefore, held that the appellant was liable only for the offence of grievous hurt under S. 325 with S. 149, Penal Code, and not for the offence of murder. In the present case the learned Sessions Judge has no doubt found that one of the common objects of the unlawful assembly was to beat Pancham Jha. But there is an obvious difference between such a finding and the finding that the common object of the unlawful assembly was to inflict injury of such

9. ('03) 5 Bom. L. R. 1023, Emperor v. Krishnarao Narayanrao.

a nature that death was its most probable consequence. In the circumstance of there being little apprehension of any effective resistance by the man in the field the members of the unlawful assembly would hardly have contemplated such violent use of arms which might result in death of one or more of the opposers. Therefore, it cannot reasonably be said that the murder was committed "in prosecution of some unlawful purpose in which the combining parties united and for the effecting whereof they are assembled."

In 22 Cal. 306¹⁰ their Lordships Beverley and Banerjee JJ. pointed out that members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and that the knowledge possessed by each member of what is likely to be committed in prosecution of their common object, will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object; and as a consequence of this, the effect of S. 149, Penal Code, may be different on different members of the same unlawful assembly. Here, therefore, such members of the assembly who inflicted the injuries resulting in the death of Pancham Jha may be held guilty for the offence of murder. Other members of the assembly who did not share in such object are liable for the offence of rioting only. The learned Sessions Judge appears to have been largely influenced in his judgment by, what he describes, the members of the assembly knew that murder was likely to be committed in prosecution of the common object of the unlawful assembly. The evidence, however, as I have stated above, shows that three of the members carried *bhala* and one only a *garassa*. This circumstance by itself hardly warrants the inference which the learned Sessions Judge seems to have drawn. There being no reasonable apprehension of any effective resistance by the men in the field the members of the assembly may reasonably have expected that mere show of their armed strength would be sufficient to drive the men off the field and at best in the event of any recalcitrant attitude of the men a few simple strokes would be sufficient for the achievement of the object of the assembly. Therefore, it cannot reasonably be said that the members of the unlawful assembly knew beforehand that murder was likely to be committed in prosecution of the common object of the unlawful assembly.

10. ('95) 22 Cal. 306, Zahiruddin v. Queen-Empress.

It follows from the above discussions that the convictions of the appellants under S. 302 read with S. 149, Penal Code, cannot be supported. As to the guilt of Kusheswar Chaudhury there is ample evidence on the record to prove that he was an actual participant in the act resulting in the death of Pancham Jha. I, therefore, agree that he is liable for the offence under S. 302 read with S. 34, Penal Code. The question whether other members of an unlawful assembly are liable for offence different from that actually committed by one or more of its members in the course of the occurrence does not seem to arise directly for decision of this case. It, however, arises incidentally as in a previous trial of some of the accused involved in the occurrence that were convicted for offence different from that which was actually committed during the occurrence. Section 149 does not create any new offence. It merely declares the liability of other members of an unlawful assembly for act or acts done by one or more of their associates in prosecution of the common purpose. Therefore, the members other than the actual perpetrator of the crime are liable for the offence that is actually committed and not for a different offence which different members of the assembly in their individual judgment may have contemplated to be likely to be committed in prosecution of the common object. The liability of the other members of the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms, or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise. But when it may reasonably be held that other members of the assembly knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object then such other members of the assembly are liable for the offence committed to the same extent as the actual perpetrator of the crime. Sir William Oldnall Russell says:

"The blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow." (Russell on Crimes, p. 117).

My learned brother has discussed this matter at some length and I do not think I can add anything useful to it. For the above reasons I concur with my brother in dissenting, most respectfully, from the principle laid down in 17 P.L.T. 350¹ and would follow the decision in 4 P.L.T. 213.² I agree to the orders proposed.

G.B./D.H.

Order accordingly.

[Case No. 95.]

A. I. R. (33) 1946 Patna 251**DAS AND RAY JJ.***Dorik Gope and others — Appellants*
v.*Emperor.*

Criminal Appeal No. 296 of 1945, Decided on 20th September 1945, from decision of Additional Sessions Judge, Purnea, D/- 14th April 1945.

(a) Penal Code (1860), S. 97—Two armed parties coming to fight—One striking other—No right of private defence of person to other.

Where two parties come armed ready to fight with each other, the mere fact that one party strikes the other party first does not, by that reason and that reason alone, give a right of private defence of person to the members of the other party : ('26) 13 A. I. R. 1926 Pat. 433, *Rel. on.*

[P 257 C 1 ; P 261 C 2]

Penal Code —

('45) Ratanlal, Page 200, Note "Defence of person."

('36) Gour, Page 363, Para. 853.

(b) Penal Code (1860), S. 97—In anticipation of resistance by violence party defending property by violent means—Circumstances in which party is entitled to benefit of right of private defence enumerated.

There may be circumstances in which one can collect a mob expecting resistance with violence from his opponent and defend his property by violent means and can still get the benefit of the right of private defence. Those circumstances must be (1) immediate danger to the property which, if not immediately protected, would be lost by the time protection of public authorities is obtained ; (2) even this justified violence by the mob for protection of property from actual invasion should be exercised within the legal limits of the right of private defence of person or property, that is to say, there must be circumstances existing leading to a reasonable apprehension of a danger arising out of a committed or attempted or threatened offence affecting person or property, as the case may be, justifying the particular injury inflicted : *Case law discussed.*

[P 260 C 1, 2]

Penal Code —

('45) Ratanlal, Page 202, Note "Defence of property."

('36) Gour, Page 366, Para. 863.

(c) Penal Code (1860), S. 99 — Protection of public authorities—Meaning of.

The protection of public authorities contemplated by S. 99 means such protection as can preserve status quo.

[P 261 C 2]

Penal Code —

('45) Ratanlal, Page 209, Note "Time to have . . . authority."

('36) Gour, Page 374, Para. 885.

*S. N. Sahay and D. L. Nandkeolyar —**for Appellants.**Government Advocate — for the Crown.*

Ray J. — This appeal is directed against the judgment of the Additional Sessions Judge, Purnea, dated 14th April 1945, convicting the appellant Dorik Gope under S. 302, Penal Code, and sentencing him to transportation for life, and convicting the appellants Jadu Gope and Sundar Gope under S. 324, Penal Code, sentencing them each to undergo rigorous imprisonment for two years.

The prosecution case is that Sarabjit Gope had taken settlement of 2.68 acres of land recorded in Plot No. 1076 of Tola Chakla of village Barahpara from Babu Gajanand Thakur, the then proprietor of the Balua Estate, in 1322 B. S. This settlement was followed by possession which, according to Sarabjit, was with him until the date of occurrence. In support of this settlement and possession, he produced an unregistered patta (Ex. 1) and rent receipts (Exs. 4 to 4-d). He further said that in the present year Sarabjit had cultivated the land with his own servants and had grown Bhadaï and Agahni paddy and that on 23rd August 1943, he had cut and appropriated the Bhadaï paddy that stood on the eastern portion of the land. On 6th September 1943, he had sent his servant Singheshwar Gope in charge of certain female labourers and one male labourer Santu Nonia to reap the remaining Bhadaï paddy. Singheshwar, on arriving at the field, found a mob of about 200 men under the leadership of the appellant Dorik Gope armed with various weapons such as bhala, swords, pharsas and lathis coming towards the field. On seeing this, he sent the aforesaid male labourer, Santu Nonia, to Sarabjit to inform him about this. Thereupon, Sarabjit came to the field along with Chulhai Gope, Bhutai Gope, Gosai Gope, Ajab Lal Gope and Hardayal Gope with the object of settling the matter with the opponents. On arriving they found that there was exchange of words going on between Singheshwar and Dorik in course of which Dorik as also his associates Sundar and Jadu were insisting upon cutting the paddy, while Singheshwar was asking them to stop till his malik, meaning Sarabjit, would come and settle the matter amicably. It is said that upon this Dorik struck a blow on

the left side of Singheshwar with his bhalas as a result of which Singheshwar fell down dead. On this, Hardayal, his uncle, protested and ran to the aid of Singheshwar. He was, however, assaulted by Jadu and Sundar with swords. On account of this assault, Hardayal sustained certain injuries. Finding that Singheshwar was dead, the mob led by Dorik fled away. This happened on 6th September 1943, between 10 A. M. and 12 noon.

Sarabjit proceeded to the police-station Forbasganj which is eight miles from the place of occurrence and lodged his first information report at 6 P. M. The officer in charge of the police-station came to the locality at 12 midnight the same day, and sent the dead body of Singheshwar for post-mortem examination and sent Hardayal for medical examination of his injuries. Sarabjit named 18 persons as being amongst the rioters including the present three appellants Dorik Gope, Jadu Gope and Sundar Gope.

On post-mortem examination on the body of Singheshwar, it was found that he had sustained one penetrating incised wound $1" \times \frac{3}{4}" \times$ abdominal cavity on the left side of the abdomen between the 8th and 9th ribs at the junction of costal cartilage with the ribs. Abdominal wall was found penetrated. Peritoneum was perforated. Stomach was perforated at its oesophageal end. According to the doctor, death was due to shock and haemorrhage due to the injuries received.

Hardayal Gope (P. W. 2) was found to have the following injuries, namely, (1) cut mark $2\frac{1}{2}" \times \frac{1}{4}" \times \frac{1}{4}"$ on the right elbow, (2) cut mark $\frac{1}{2}" \times \frac{1}{4}" \times \frac{1}{4}"$ on the base of the left little finger, (3) cut mark $1\frac{1}{2}" \times \frac{1}{4}" \times \frac{1}{4}"$ on the base of the left ring and middle fingers, and (4) cut mark $\frac{1}{2}" \times \frac{1}{2}" \times \frac{1}{2}"$ on the tip of the left index finger. The doctor opined that the injuries were simple in nature caused by sharp edged weapon such as sword.

The Sub-Inspector of Police, after investigation, charge-sheeted all the 18 accused persons named in the first information report, and eventually they were committed to the Court of Session and were tried by the learned Additional Sessions Judge of Purnea. Dorik Gope was charged under S. 302, Penal Code, for having committed murder by intentionally causing the death of Singheshwar Gope. The other 17 accused persons named in the first information were charged under S. 302/149, Penal Code, for having abetted the commission of murder

of Singheshwar by Dorik. Dorik, Jadu, Sundar and two other persons, since acquitted, were charged under S. 148, Penal Code, for being members of an unlawful assembly armed with deadly weapons such as swords and bhalas in prosecution of the common object of such assembly, namely, to cut paddy forcibly from the paddy field belonging to Sarabjit and thus having committed the offence of rioting punishable under S. 148, Penal Code. The other thirteen persons were charged under S. 147, Penal Code, for being members of an unlawful assembly with the common object of forcibly cutting away paddy from the field of Sarabjit Gope. Lastly, Jadu Gope and Sundar Gope with another, since acquitted, were charged under S. 324, Penal Code, for having voluntarily caused hurt to Hardayal Gope by swords which are sharp cutting instruments.

The defence of the accused persons was that the occurrence as alleged is not true. The land in dispute was taken settlement of by one Durga Jha from the common manager of the Balua Estate in August 1942, as per a registered kabuliati. Durga Jha was in possession of the said land through his adhiyadar Sahdeo since then. The Bhadaï and Agahni crops grown on the disputed plot had also been grown on adhiya system by the same Sahdeo as under-raiyat of Durga Jha. On the date of occurrence Sahdeo and Dhaturi were reaping a part of the Bhadaï crop under the supervision of Bhulku, a servant of Durga Jha. While they were thus reaping the paddy, Sarabjit, the complainant, brought a mob of fifty or sixty people who were armed with swords, ballam, pharsas, bows and arrows, lathis and kachias. They began to reap the paddy and were opposed by Bhulku. On this, Bhulku was assaulted by Asharfi, son of Sarabjit, with an arrow and was also struck by Singheshwar, deceased, with garhail. Dhaturi was struck by Chulhai with ballam and by Banku with an arrow after which all of them, that is, Sahdeo, Dhaturi and Bhulku fled. They had no arms and they cannot say who struck Singheshwar, who, according to them was not assaulted so long as they were there. The other accused persons pleaded not having been present nor having taken part in the riot at the time of occurrence. On the respective cases of the parties, the question of the right of private defence of property and person arose and for determination of this question the fact of possession and ownership of the disputed plot 1076 came to be considered. The learned Additional Sessions Judge finds that the

unregistered patta of the year 1322 by which the disputed land was settled by Gajanand with Sarabjit is a genuine document and so are the rent receipts Exs. 4 to 4-d. The learned Judge, in this connection, observes :

"So, I have no doubt that the contention of the prosecution that the land in question was settled with Sarabjit by Gajanand Thakur is correct, and I have also no doubt that he was in possession of it for some time."

With regard to the present possession, however, the learned Judge holds: "So his claim that at the time of the occurrence he was in possession of the land does not appear to be correct." According to the learned Sessions Judge, for some time after Sarabjit ceased cultivating the land, it used to remain *parti* for years together till Durga Jha took settlement thereof as spoken of above, and started cultivating through his *bataidar* Sahdeo Nonia. That Sahdeo Nonia cultivated the land and grew the crops in the year before the occurrence is admitted by prosecution witness Santu Nonia as also by some of the other prosecution witnesses. Thus considering the admitted facts and the documentary evidence produced by the defence, the learned Judge finds :

"So, I have no doubt that at the time of the occurrence Durga Jha was in possession of the land through his *bataidar* Sahdeo Nonia under a settlement taken by him. No doubt a different view, on consideration of the evidence on record and the circumstances disclosed, can be taken about the present possession of the disputed land and the crops thereon. But neither party having contested the point and the learned trial Court having come to its finding about the present possession, it will be assumed, to be so, for the purpose of this case. Before proceeding further, what appears to me to be a point of great significance is that admittedly on 23rd August 1943, Sarabjit had cut and taken away the *Bhadai* paddy crop from the eastern side of the *khassra* plot No. 1076 which is claimed to have been grown by Durga Jha's *bataidar* Sahdeo Nonia. Durga Jha filed a petition of complaint in the Court of the Magistrate having jurisdiction on 25th August 1943, charging Sarabjit and some of his men with offences under Ss. 379, 143 and 447, Penal Code, and Durga Jha in his deposition in support of this contention said 'I got settlement of the land from Balua Estate three years back. The accused wanted settlement but could not get it and hence they created the trouble. Last year the accused did not create any trouble. Year before last also the accused did not create any trouble. I informed the police about fifteen days back that the accused would reap the paddy. I was asked to come to Court.'"

It is now admitted that this petition of complaint was dismissed, the learned Sub-divisional Magistrate being of opinion that the complainant Durga Jha was not in possession of the land as claimed by him. It appears that no further action was taken by Durga

Jha as against this order, nor any steps of prohibitive character whatsoever were taken by him to safeguard his right and possession over the property. The learned Sessions Judge, with regard to facts bearing upon the occurrence, records certain findings which have also not been agitated before us. I proceed to enumerate them one by one: (1) The contention of D. W. 4, Sahdeo Nonia, that he along with Dhaturi was peacefully reaping the paddy under the supervision of Bhulku, a servant of Durga Jha, when all of a sudden Sarabjit came there with a mob and began to assault them cannot be accepted as correct; (2) Both parties went there armed ready to fight; (3) All the accused persons named in the first information report were present at the occurrence on the side of Durga Jha; (4) The two parties, namely, that of Sarabjit and Durga Jha were on terms of enmity with each other; (5) There is no satisfactory evidence to show that Durga Jha and his brothers had previous information of the intended reaping of the paddy by the men of Sarabjit which could have made them seek the protection of police in time instead of assembling men to ward off an intended attack.

After having arrived at these findings, he acquits the accused persons of the offences under Ss. 147 and 148, Penal Code, with which they had been charged inasmuch as the common object of the assembly as stated in the charge was not established. In view of his findings, the paddy field did not belong to, nor the paddy had been grown by Sarabjit, the complainant, and with these findings I agree. In convicting Dorik Gope of the offence of murder under S. 302, Penal Code, he arrives at the following findings: (1) There can be no doubt that the person who gave the *bhala* blow to Singheshwar had intention to kill him or at least knew that the injury which he was going to inflict on him was likely to cause his death. (2) He has no reason to disbelieve the evidence of the witnesses who have spoken that the *bhala* blow on Singheshwar that caused his immediate death was given by Dorik Gope, one of the appellants. (3) There was no general fight between the two parties and the contention of the prosecution that Singheshwar was given the fatal *bhala* blow before any fight took place between the parties appears to be correct. (4) The right of private defence to the extent of causing death is not available to Dorik under the circumstances of this case as at best, Singheshwar had committed only a trespass on the land

in possession of Durga Jha. (5) There is nothing in the evidence to show that Dorik at the time he inflicted the fatal blow on Singheshwar had reasonable cause to apprehend that Singheshwar was going to cause his death or to cause a grievous hurt on him. According to the evidence of the prosecution witnesses, Singheshwar was only remonstrating with Dorik in respect of his intention to forcibly reap the standing paddy crop, and there is no evidence to the contrary and so he has no reason to disbelieve this "prosecution version of the occurrence."

On these findings, he holds that Dorik is not entitled to the benefit of the right of private defence. The other two appellants were acquitted of the charge under S. 302/149, Penal Code, but have been held guilty under S. 324, Penal Code, for their individual acts of assault with sharp edged weapons. The learned Judge accepts the evidence about the two accused Jadu and Sundar having caused injuries by their assault on Hardayal as sufficient and denies to them the right of self-defence as he finds that Hardayal had either only protested against the assault on his bhagina Singheshwar, or to assault Dorik, for the injuries inflicted on Singheshwar. Under these circumstances, according to him, the appellants Jadu and Sundar were not entitled to protection of the right of self-defence. None of these findings, as aforesaid, has been challenged before us by either side except in a general way by the defence counsel who said that the prosecution witnesses being inimical and partisans should not be believed at all. The only other contest that has been put forward by the appellants' learned counsel is that all the appellants are entitled to an acquittal as their acts do not amount to offences on account of their right of private defence of property and of person as well while the learned counsel for the Crown urges most emphatically that in view of the finding of the learned Sessions Judge that both parties came armed for a premeditated fight and for trial of their strength, the right of private defence is not available to either of the parties.

In view of the learned Sessions Judge's findings the case of Jadu Gope and Sundar Gope presents no difficulty. He finds that Singheshwar had committed trespass and Hardayal was with him as one of his supporters. According to S. 104, Penal Code, the exercise of the right of private defence of property when occasioned by either committing

or attempting to commit offences of theft, mischief or criminal trespass, extends, subject to the restrictions mentioned in S. 99, to the voluntary causing to the wrong-doer of any hurt other than death. In the present case the trespass committed by Sarabjit's men amounts to criminal trespass as their intention was to prevent taking of paddy belonging to him by Sahdeo Nonia and Durga Jha. According to the learned Judge's finding, there was no time to take recourse to protection of the public authorities. They should, therefore, on the findings as they are correct, be entitled to the right of private defence of property. This aspect of their case has not at all been considered by the learned Judge. They are, therefore, entitled to be acquitted. In respect of Dorik Gope, appellant, it is to be considered not only if right of private defence of property is available to him but also if his exercise of that right, would extend to killing Singheshwar, deceased. To this end, I propose to examine the evidence on record, afresh in the light of the law on the subject.

The right of private defence of body commences as soon as reasonable apprehension of danger to the body arises *from an attempt or threat to commit* the offence though the offence may not have been committed and it continues as long as such apprehension of danger to body continues: *vide* S. 102, Penal Code. This right of private defence of body extends subject to other restrictions, to the voluntary causing of death, if the offence which occasions the exercise of the right be of any of the descriptions enumerated in S. 100, Penal Code. In this particular case it would be either the offence of committing an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault, or an assault as may reasonably cause the apprehension that a grievous hurt will otherwise be the consequence of such assault (first and secondly of S. 100). In order to decide whether the right of private defence of body to the extent of voluntarily causing death is available to the appellant Dorik Gope, we have to examine the evidence in order to arrive at our conclusion whether there was any reasonable apprehension of such an assault from the hands of Singheshwar or any member of the prosecution party as may reasonably cause the apprehension of either death or grievous hurt, and whether the apprehension arises not from preparation but from attempt or threat to commit the offence of such assault,

there being no clear finding in this respect by the learned trial Court.

The right of private defence of property extending to the voluntary causing of death arises if the offence, the committing of which or the attempt to commit which occasions the exercise of the right, be an offence of any of the descriptions enumerated in s. 103, Penal Code. Of the offences therein enumerated, those enumerated in clause *fourthly* being relevant to the present case, we have to see, therefore, from the evidence whether there was either committing or attempting to commit the offence of theft or mischief or house trespass under such circumstances as may reasonably cause the apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. I have to examine the evidence in order to ascertain the following facts, namely, (1) how Singheshwar Gope, the deceased, was armed; (2) how the members of the mob collected by Sarabjit and taken to the field were armed; (3) how and under what circumstances Dorik Gope inflicted the fatal blow on Singheshwar; (4) whether Dorik Gope had sufficient reason to apprehend either death or grievous hurt either from Singheshwar or from any other member of Sarabjit's mob; (5) what offence either affecting human body or property was committed or attempted to be committed or threatened to be committed, to occasion the exercise of the right of private defence either of body or of property on the part of Dorik extending to the voluntary causing of death; and (6) whether there existed circumstances which would leave time for Durga Jha or his men to have recourse to the protection of the public authorities before collecting men and coming to the field for protecting his rights to the property in dispute. P. Ws. 2, 3, 10 and 12 would maintain that neither Singheshwar nor any of the opponents of Sarabjit who went to the field on being sent for through Santu Nonia by Singheshwar had either lathi or any other weapon. But P. W. 5 says that Singheshwar had a lathi and not a ballam. According to P. W. 4 Gosai Gope, he had taken his lathi and it is admitted by P. W. 2 and also deposed to by other prosecution witnesses that he (Hardayal) had a lathi. The only defence witness 4, Sahdeo Nonia, who has spoken about the occurrence, speaks that the mob of Sarabjit consisting of 15 or 16 men were armed with swords, ballam and other weapons. But he, being a very interested witness and a partisan, cannot be

relied upon in the absence of any other corroborative evidence. It is clear, as the evidence shows (1) that Singheshwar had no other weapon except a lathi and (2) of the members of the mob collected by Sarabjit and taken to the field, only two people, namely, Hardayal P. W. 2 and Gosai Gope P. W. 4 had each a lathi and the rest had no sort of weapon whatsoever. P. W. 11, who was tendered for cross-examination, has deposed that both sides were using their weapons and that there were lathis, bhalas and ballams on the side of Singheshwar also. But this evidence cannot be relied upon because on his own showing he gives two different versions with regard to his competency as a witness. In his cross-examination by the defence he said: "I had seen the fighting from a distance." He was then declared hostile and cross examined by the prosecution. In this part of his evidence he said "I had not seen the actual fight. When the fight was over and I approached near the field, then I saw two groups of men." For this reason in coming to my finding as to what were the arms with which Sarabjit's men were armed, I have not taken the evidence of P. W. 11 into consideration.

The facts of the actual occurrence just preceding Dorik's infliction of the fatal blow on Singheshwar are like this. Singheshwar, Santu Nonia and some female labourers had gone to the field for cutting the Bhadaï portion of the crop then standing but Singheshwar finding that there was a large body of people led by Dorik coming towards the field, he could anticipate the object of the mob and sent back Santu Nonia to inform his malik Sarabjit of this. On being cognizant of the fact, Sarabjit came to the field with several persons of whom, according to the evidence, only two people had lathis. It is said that hardly Sarabjit and his men had entered into the field when Singheshwar was given the fatal blow.

As to what was actually happening at the time when Sarabjit arrived and what occasioned Dorik giving this fatal blow has been deposed to by the prosecution witnesses in the following manner. P. W. 1 says that Singheshwar and Dorik exchanged hot words, Dorik insisting on cutting paddy and Singheshwar asking to settle the matter amicably, though in a high tone. At this Dorik struck Singheshwar. There was no reaping. Singheshwar and Dorik were not abusing and Singheshwar did not say that "My malik will set you right." P. W. says that Singheshwar and Dorik were exchanging

hot words and Dorik was insisting to cut and Singheshwar to settle the matter. Dorik struck during this talk. P. W. 3 says —

"we were called to go and explain. Dorik and Singheshwar were exchanging hot words. Dorik was insisting to reap and Singheshwar asking to settle amicably. Dorik and others were speaking that they must reap the paddy and Singheshwar was speaking that he won't allow as directed by his malik."

P. W. 4 says that Singheshwar was saying 'Let the malik come' when he was struck. The mob fled finding Singhehsvar dead. P. W. 5 says that Singheshwar was saying "He will not allow Dorik and others to cut paddy. Hence he was struck." P. W. 10 deposed, 'Dorik and Singheshwar were exchanging hot words.' Singheshwar was speaking "He won't allow without the order of the malik" and that he had come and was standing. They should ask him. On this, the men on the side of Dorik began to reap and Singheshwar opposed. Singheshwar opposed not by using his lathi but only orally speaking that he will not allow reaping of paddy. So he was struck with the bhalas by Dorik. P. W. 12 says : None of us tried to assault. When I with others came to the field, Singheshwar and Dorik were quarrelling. Dorik struck Singheshwar with a bhalas on the left side of the abdomen. According to D. W. 4, they had arrived in the field earlier and were reaping paddy which was on the west of Agahni crop. They had commenced from the south-east corner of that crop and had reaped paddy of about two kathas when the mob of Sarabjit arrived. The mob of Sarabjit had begun to reap and then it was opposed. That he had opposed reaping of the paddy by the mob by the word of mouth only. The Sub-Inspector of police who visited the locality saw no blood marks in the field. He found the dead body of Singheshwar on the ridge at a place marked A in the map, and it is to the further south of that place that blood marks were found which is noted B in the map. According to him, he found no indication that the dead body was removed from some other place. The Sub-Inspector found that a portion of Bhadaï crop in what can be roughly called south-east corner of the plot on which Bhadaï crop was standing had been cut. There were no marks of paddy having been cut in two different places.

The evidence of D.W. 4 cannot be accepted at its face value. According to his evidence read as a whole, there was no armed mob on the side of Durga Jha present at the place of occurrence. According to him, there

was no assault on Singheshwar and that before any such assault could be inflicted, everybody on his side had left the place of occurrence after being assaulted by the members of Sarabjit's party. According to him, Singheshwar struck Bhulku with bhalas, while, as we have seen above, that Singheshwar had nothing but a lathi with him, nor any of his party men who had arrived just at that time had any such weapon with any one of them. Therefore, accepting the prosecution evidence at its face value, the fact leading to the fatal blow by Dorik appears to be that Singheshwar was simply abusing verbally Dorik's men reaping the paddy. So far as Sarabjit's men who arrived later are concerned, they had neither started reaping nor had joined in the quarrel between Singheshwar and Dorik nor had tried to assault nor gave any threat to assault either Dorik or his men. But I shall notice presumably that this view cannot be certainly accepted. The place of assault, however, it seems very clearly from the condition of the spot as seen by the Sub-Inspector of police, was not in the field but on the ridge and a few paces away from the portion of the field from which paddy had been cut on that day. This place of cutting exactly tallies with the place of cutting by Dorik's men as deposed by D.W. 4. It is clear, therefore, that no offence to the property was either committed or attempted to be committed by Sarabjit's men before there could be any occasion for Dorik to assault Singheshwar fatally. Whatever opposition was given to Dorik's men cutting paddy was verbal opposition only.

But the prosecution evidence cannot be accepted as a whole and in view of certain circumstances appearing clearly on the record, a view should be taken modifying, in certain respects, the findings of the learned Additional Sessions Judge. That is (1) on a careful consideration of the evidence of the doctor N. K. Mitra (D.W. 5) and of the nature of injuries on Bhulku Gope and Dhaturi, it cannot be held that they were all self-inflicted or inflicted by friendly hand. It has to be found that they were wounded during the occurrence by men of the prosecution party; (2) These injuries lead to the inference that the prosecution party had come to the place of occurrence armed with weapons such as bhalas, arrows and other sharp edged weapons; (3) That Singheshwar was not alone remonstrating with Dorik but came to the spot with an armed mob some of the members of which inflicted the aforesaid injuries

on Bhulku and Dhaturi; (4) That some of the prosecution witnesses are inimical to Dorik and Durga Jha, and, therefore, they have concealed the fact that they came armed with deadly weapons and inflicted injuries noticed above on some men on the defence side though their evidence as to Dorik inflicting the fatal blow on Singheswar, deceased, is quite acceptable and is accepted by us in agreement with the learned lower Court. It has now to be examined whether in this view of the occurrence Dorik is completely protected by the right of private defence of property or person. As to the right of self-defence of person, the question cannot arise inasmuch as both parties came armed to fight and merely one party striking first does not, by that reason and that reason alone, give a right of private defence of person to the members of the other party.

But as a party has got the right to protect his property by collecting strength for employment of violent means, the members of the defence party have got the right of private defence of property. Even then, the right to voluntarily cause death is limited by circumstances defined in the Statute. This definition requires that (1) the right must be occasioned by the committing or the attempting to commit any of the offences enumerated in S. 103, Penal Code, (2) criminal trespass as found by the Sessions Judge, is not one of the offences so enumerated and (3) commission of theft, or attempt to commit theft must be under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. In this case no theft of paddy was committed nor was there any attempt to commit. The result of the Sub-Inspector's local inspection as summarised by me above does not lead to any such conclusion. It rather shows that either the fight began as soon as the main prosecution party came to the ridge of the field, or while they were reaping. The right of private defence may well commence under such circumstances according to S. 105, Penal Code, but it will not extend to voluntarily causing of death unless the conditions of S. 103, Penal Code, are fulfilled.

No circumstances favouring the right of private defence is to be assumed. Section 105, Evidence Act, lays down that the Court shall presume the absence of such circumstances as will bring the case within any of the general exceptions in the Penal Code. The

defence has failed to establish any such circumstance. Next point to be considered is whether S. 99, Penal Code, is applicable to the facts of this case. In this connexion it has to be considered that Durga Jha long before the date of occurrence had notice of the fact that Sarabjit was laying claim to the disputed plot and the crops thereon and had in fact succeeded in cutting a part of the crop without any opposition. It was, therefore, quite clear to Durga Jha that his claim to reap the standing crop on the disputed field should be resisted by Sarabjit. He may or may not have notice of Sarabjit coming to oppose with a force. It is a case, therefore, where Durga Jha should have after the order of dismissal taken steps to vindicate his right in Court. On the contrary, he took no steps regarding the order of dismissal by the Sub-divisional Magistrate of his complaint against Sarabjit about his interference with his right in respect of this very plot. He did not take steps to start proceedings under S. 145, Criminal P. C., and to get the crops attached till determination of the dispute as to possession being either with him or with his opponent. It has to be seen whether, under these circumstances, it can or cannot be held, that the accused had time to take recourse to the protection of public authorities within the meaning of S. 99, Penal Code.

It has, however, been urged by the learned counsel for the Crown that, as both parties came armed for a premeditated fight, the question of the right of private defence does not arise. This argument amounts to saying that in a case where both parties engage themselves in a pitched battle, having come ready for the purpose, circumstances which would otherwise give the assailants a right of private defence either of property or of body will be of no avail. It is, therefore, necessary to consider whether this contention, in this very wide form, is correct. The earliest decision on the point in 1 C. L. R. 521¹ in which the proposition was laid down in the following terms, namely:

"where both parties are armed and prepared for battle and it is not shown that they were acting within the legal limits of the right of private defence, it does not matter which is the first to attack."

The proposition as laid down clearly makes allowance for cases in which the parties so armed and so prepared for a battle act within the legal limits of the right of private defence. This case was dealt with

1. (78) 1 Cal. L. R. 521, *In re Kali Bepari*.

in what is known as *Kabiruddin's case*, 35 Cal. 368.² Rampini J. at p. 376 of the report, after quoting the aforesaid passage, proceeds to consider the various provisions contained in ss. 99 to 105, Penal Code, to see if, in the particular case before him in which both parties deliberately engaged in very large numbers in a pitched battle having come armed for a fight to enforce their right or supposed right, the appellants did or did not act within the legal limits of the right of private defence. This clearly shows that his Lordship was not of opinion that in a case like the one before him, the question of the right of private defence cannot arise. He further says that the right of self-help when it causes or is likely to cause damage to person or property of another must be restricted and recourse to public authorities must be insisted on. Referring to *Holloway J.* in 7 Mad. H. C. App. XXV, he says the natural tendency of law of all civilised states is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country like India. Sharfuddin J. in the same case, referring to the restrictions to one's right of private defence given in ss. 96 to 106, Penal Code, says :

"By the above restriction an accused cannot set up this right with regard to property in his possession if he has time to invoke the protection of the authorities. In cases of sudden fights, where there has not been any preparation by either side, a man, no doubt, is within the law, if in defending his property he causes such bodily injuries to the aggressive party as are allowed by the sections of the Penal Code which deal with the right of private defence."

Referring to the facts of the case he summarises (a) that there had been a premeditated fight between the parties, (b) that the remonstrances of the two constables were ineffectual, (c) that there was no pressing necessity to repair the pyne, and (d) that there was ample time to seek the protection of the authorities, and then holds "it was immaterial as to which of the parties was in possession." In my view the *ratio decidendi* of this decision is not to rule out the right of private defence of property or body simply because a party comes with a premeditated motive of fighting. If such a party has had no time to take recourse to public authorities, and if such a party is entitled to invoke the aid of the provisions of the Penal Code relating to right of private defence of body or property on the particular facts of that case, he is still entitled to the right of private defence.

. ('08) 35 Cal. 368, *Kabir-ud-din v. Emperor*.

In 2 Pat. 595³ the case of *Kabiruddin*² came to be considered, and it was held that where possession is in dispute, or where there is no time to seek the assistance of the authorities, there is no obligation upon a person entitled to exercise the right of private defence and to defend his person or property, to retire merely because his assailant threatens him with violence. *Kabiruddin's case*² was distinguished on the ground that the question of possession in that case was in dispute and there was sufficient time to inform the authorities, and, therefore, they were members of an unlawful assembly having come prepared to fight in their attempt to enforce a right or supposed right of violence.

In 35 Cal. 368² Sharfuddin J. laid down that even if an accused has possession, he cannot plead that in support of his plea of right of self-help, if he has time to invoke the protection of the authorities. In the case of *Nareschi Singh*³ the correctness of this proposition is not doubted, because in giving the benefit of the right of self-help, their Lordships put this as a condition that where there is no time to seek the assistance of authorities, the accused is under no obligation to retire from his field.

In 11 Pat. 523⁴ it was held that there was no distinction between forming an assembly to enforce a right or supposed right within the meaning of S. 141 (fourthly), Penal Code, and forming an assembly forcibly to maintain an existing right, and that the proposition of the law that an assembly would be considered not unlawful unless the prosecution could show affirmatively that it was an assembly for enforcing a right or supposed right and not for maintaining an existing right was negatived, and the law laid down in this behalf in 16 Cal. 206,⁵ was re-affirmed for the guidance of the Courts of this province. It was there laid down that it was for the accused to prove right of private defence, and, therefore, it was for him to establish that he had possession, and that possession was required to be protected by force against the offence of theft. In short, the *ratio decidendi* of this decision is that a party of men who came armed in a body either to enforce or maintain an existing right or a supposed right by use of force and

3. ('24) 11 A. I. R. 1924 Pat. 388 : 2 Pat. 595 : 82 I. C. 505, *Nareschi Singh v. Emperor*.

4. ('32) 19 A. I. R. 1932 Pat. 215 : 11 Pat. 523 : 139 I. C. 616, *Ghyasuddin Ahmad v. Emperor*.

5. ('89) 16 Cal. 206, *Ganauri Lal Das v. Queen-Empress*.

violence or show thereof, are members of an unlawful assembly, there being no distinction between enforcing a right or maintaining a right, and that in such a case it is the duty of the defence to establish that they have possession, and that this possession is required to be protected by force against an offence. So, according to this case also, even in a case of a premeditated fight, the right of private defence is available if the circumstances necessary for such right under the provisions of the law do exist.

In the case of *Matte Mandal v. Emperor*,⁶ a case that was decided by the same Bench as the case of *Ghyasuddin Ahmad*,⁴ *Kabiruddin's case*² was followed, and it was held by Rowland J., Courtney-Terrell C. J. concurring, that the substantial fact being that the party of the accused went to the place knowing that they would meet opposition taking with them a large body of men to defeat that opposition, and the party of the prosecution incidentally having done exactly the same thing, it is clear that neither party can claim a right of private defence and the assemblies of the men on both sides were unlawful, and that it was not of much importance in the circumstances which side began to attack when both parties contemplated a fight and prepared for it in advance. But at the same time Rowland J. said :

"In the present case the real question is whether the accused had any right of private defence, and on this point the restrictions imposed on that right by S. 99, Penal Code, are important."

Coming to the facts of that case, it was clear that the accused party refused to take recourse to protection of public authorities, even though there was time enough to do so, and it was, therefore, held that they could not invoke the right of private defence. Next case that deserves notice is the case in 5 Pat. 520.⁷ That was a case in which both parties came armed in large numbers and there was a free fight causing death. The accused took up the plea of private defence of property as well as of person. With regard to the former, it was held that the burden of proof was on the accused, and it was not proved that the accused were defending an existing possession. As to the plea of defence of person, it was held relying upon 7 W. R. 34,⁸ 1 C. L. R. 521,¹ 35 Cal. 368² and 20 ALL. 459⁹ "That when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with

men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other."

It appears, therefore, that both parties coming in large numbers for a premeditated fight is an answer to the *plea of defence of person only*. There would be some justification here to refer to the case of the Allahabad High Court, namely, 20 ALL. 459,⁹ because of its acceptance as a good law in the case of *Anup Singh v. Emperor*,¹⁰ an unreported decision of this Court, decided by Rowland J., the principles of which are approved and accepted in 17 Pat. 607.¹¹ In *Prag Dat's case*⁹ at pp. 462-463 of the report the proposition of law is laid down in the following passage :

"If a body of men go down to meet another body of men evidently intent upon picking a quarrel over a piece of mud wall, go down armed with a loaded gun and use that gun within a short interval of their arrival it is for them to rebut the inference which at once arises that their intention was by means of criminal force, or show of criminal force, to enforce their rights or supposed rights The presence of Laltu with his gun proves that the accused were prepared to defend this mud wall even to the voluntarily causing of death, and the burden lay heavily upon them of proving that they acted under reasonable apprehension that death or serious hurt would be the consequence if the right of private defence were not exercised The law in India is that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code is upon the accused, and it is directed by the Statutes that the Court shall presume the absence of such circumstances."

In 17 pat. 607¹¹ it was found as a fact that the accused had title and possession, but he could not get the benefit of the right of self-defence because there was no immediate danger to any property, neither standing crop, nor any valuable structure, but both parties expected attack from one another and the object of the assembly was not to prevent an aggression but to try out their strength by means of a pitched battle. In that case the principles laid down by Rowland J. in *Anup Singh v. Emperor*¹⁰ were quoted with approval which may also be quoted here, namely, that (1) there is no right of private defence when a riot is premeditated unless the object of the assembly is shown to have been to repel forcible and criminal aggression. (2) In appropriate cases the right of private defence is an answer to a charge of rioting. (3) The cases in A. I. R.

10. Cri. Revn. No. 588 of 1935.

11. ('38) 25 A. I. R. 1938 Pat. 518 : 17 Pat. 607 : 176 I. C. 740, Satnarain Das v. Emperor.

6. ('32) 19 A. I. R. 1932 Pat. 189 : 137 I. C. 693.

7. ('26) 13 A. I. R. 1926 Pat. 433 : 5 Pat 520: 98 I. C. 394, Farman Khan v. Emperor.

8. ('67) 7 W. R. Cr 34, Queen v. Jeolal.

9. ('38) 20 All. 459, Queen-Empress v. Prag Dat.

1929 Pat. 705¹² and 11 Pat. 523⁴ are not inconsistent with the cases in 3 P. L. J. 419¹³ and 14 P. L. T. 228¹⁴ as in the latter cases the person in possession saw actual invasion of his rights which invasion amounts to an offence, and he is entitled to collect such members and such arms as were necessary for the purpose of defending himself and his property, *there being no time to get police help*. (4) In *Kabiruddin's case*² and *Matte Mandal's case*⁶ the parties in vindicating their disputed rights of irrigation and fishery having no particular occasion or necessity to exercise them on the day of occurrence, went forth under arms expecting and intending to bring on a violent encounter. It was held that whether their claim was good or bad, there could be no right of private defence in those circumstances, and that the observations made in those cases must be read with reference to those circumstances. In 18 Cr. L. J. 663¹⁵ in considering as to whether one has time enough to have recourse to protection of public authorities it was said:

"The learned Sessions Judge suggests that they had plenty of time to go on to the police station and to make a report of theft. It is true that they had ample time to do that, but that would have been of very little use so far as the protection of the property was concerned. The damage and loss would have been completed before the police could have arrived. The case cannot for a moment be compared to the reported case in 20 All. 459⁹ and the other cases which are mentioned in that judgment. Furthermore, it is not a case in which the opposite party were merely ploughing up the land and preparing it for sowing. In the latter case no damage is being done, and there is ample time to have recourse to the protection of the public authorities for the enforcement of their right. In the present case, property was actually being cut and damaged: If the applicants had gone to the police station and returned with police help the damage would have been completed."

It is clear, therefore, that there are circumstances in which one can collect a mob expecting resistance with violence from his opponent and defend his property by violent means and can still get the benefit of the right of private defence. Those circumstances must be (1) immediate danger to the property which, if not immediately protected, would be lost by the time protection of public authorities is obtained; (2) even this justified violence by the mob for protection

of property from actual invasion should be exercised within the legal limits of the right of private defence of person or property, that is to say, there must be circumstances existing leading to a reasonable apprehension of a danger arising out of a committed or attempted or threatened offence affecting person or property, as the case may be, justifying the particular injury inflicted. It would not be out of place to add a few statements from standard authors of the English common law about right of self-defence, just to show with what restraint the right of justifiable homicide can be caused. Though the laws in this respect in both the countries may not be identical, they are in *pari materia*. The English common law on the subject of excusable homicide in private defence of person or property has in some cases been authoritatively said to be almost same as the law in India. This further justifies me to quote certain passages from the standard authors on the subject which may illustrate the position more clearly than I could otherwise express. Archbold's Criminal Pleading, Edn. 31 p. 871, Art. 4:

"If two men fight upon a sudden quarrel, and one of them after a while endeavours to avoid any further struggle, and retreats as far as he can, *until at length no means of escaping his assailant remain* to him, and he then turns round and kills his assailant in order to avoid destruction; this homicide is excusable, as being committed in self-defence, and malice apart, it is little matter, in such a case, which struck the first blow at the beginning of the contest. And the same, of course, applies where one man attacks another, and the latter, without fighting flees and then turns round and kills his assailant, as above mentioned. But, in either of these cases, to show that it was homicide *se defendendo*, it must appear that the party killing had retreated either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him; for the assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence, *if there is no other way of saving his own life, he may kill his assailant instantly* Not only is the manner of the defence to be considered; the time also is important. If the person assaulted does not fall upon the aggressor until the affray is over, or when he is running away, that is revenge and not defence."

At p. 878:

"If any person attempts to rob or murder another in or near the highway or in a dwelling house, or attempts burglariously to break into a dwelling-house in the night time, and is *killed in the attempt*, the slayer is entitled to acquittal, for the homicide is justifiable, and the killing is without felony. The same rule applies where a man is killed in attempting to burn a house or where a woman kills a man who attempts to ravish her, or where a man is killed in attempting to break open a house in the day-time, with intent to rob. . . . The above rule, however, does not extend to felo-

12. ('29) 16 A. I. R. 1929 Pat. 705 : 123 I. C. 75, Ramphal Das v. Emperor.

13. ('18) 5 A. I. R. 1918 Pat. 193 : 3 Pat. L. J. 419 : 44 I. C. 33, Fauzdar Rai v. Emperor.

14. ('33) 20 A. I. R. 1933 Pat. 434 : 145 I. C. 794 : 14 Pat. L. T. 228, Subedar Singh v. Emperor.

15. ('17) 4 A. I. R. 1917 All. 119 : 40 I. C. 311 : 18 Cr. L. J. 663, Jageshar Rai v. Emperor.

nies without force, such as picking pockets, nor to misdemeanours of any kind; and even in cases within the rule it must be proved that the intent to commit such forcible and atrocious crime was *clearly manifested by the felon*, otherwise the homicide will be manslaughter at least, if not murder. . . . In cases within the rule, it may be necessary to observe that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he finds himself or his property out of danger. But he must not strike blows except in self-defence. What we have now said relates to felonies by force. In the case of forcible misdemeanours, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet, *if he kills him, it will be manslaughter.*"

Russell on Crime, 9th Edn. p. 505 —

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, *he must shew first that before a mortal stroke given he had declined further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death.*"

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"In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. . . . Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that the *defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in immediate danger.* If he used the weapon, having no other means of resistance, and no means of escape in such case, if he retreated as far as he could he would be justified. . . . Where the prisoner levelled a gun at the deceased, and it was a question whether the gun went off accidentally or not, Cockburn C. J. left the following question to the jury: Was the gun levelled by the prisoner at the deceased in self-defence against an attack of the deceased endangering life or limb, or reasonably apprehended by the prisoner as likely to do so, in either of which cases the prisoner would be entitled to an acquittal."

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"A man is justified in repelling force by force in defence of his person, habitation, or property, against one who manifestly *intends and endeavours* by violence or surprise, to commit a felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. But the rule does not apply to any crime unaccompanied with force, such as pocket

picking. The intent to murder, ravish, or commit a felony attended with force or surprise, should be apparent, and *not be left in doubt*; so that if A makes an attack upon B, it must plainly appear by the manner of the assault, the weapon, etc., that the life of B is in imminent danger; otherwise his killing the assailant will not be justifiable self-defence."

In this view, therefore, we have to see in this particular case (1) whether Durga Jha had actual possession of the property; (2) whether that possession required to be protected by force; (3) whether he had time enough to have recourse to the protection of public authorities within the meaning of S. 99, Penal Code; and (4) whether the right of using that force extended to the extent of voluntarily causing death. I have held above that Durga Jha had previous notice of Sarabjit claiming the property and having used force in taking away a part of the property beforehand. Therefore in all probability he would expect resistance with violence from Sarabjit and was justified in coming with a number of armed men to protect his property; but, in my view, there is nothing on the record to show that he could have got such protection by recourse to public authorities, in this particular case, as could keep him in present possession of the paddy crops which he was entitled to harvest. He could get that remedy only if there was time enough for him to get police help at the time of the occurrence. But the police station being 8 miles away, it cannot be said that after knowing that Sarabjit was coming with a mob, he could take recourse to public authorities. Keeping in view the decisions referred to above holding that a party is under no obligation to retire from his field on the appearance of a mob collected by his opponents on the scene and intent upon using violence, I would hold that S. 99, Penal Code, is no bar to the appellant Dorik getting benefit of the right of private defence of property, he having come to the scene of the occurrence to defend the actual possession of Durga Jha. Here I am taking the view that the protection of public authorities means such protection as can preserve *status quo*. His right of private defence of person, according to 5 Pat. 520⁷ would be non-existent for the simple reason that he came with a mob for a premeditated fight and in such circumstances if he is first attacked, he would have no plea of self-help available to him.

The question next arises whether he had the right of private defence of property to the extent of voluntarily causing death of

Singheshwar. That he has voluntarily caused his death is a matter beyond all reasonable doubt. His right in this respect is limited by s. 103, Penal Code. This section requires, with reference to the facts of this particular case, that there must have been either committing of, or attempting to commit, theft under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. I have shown above that there was neither cutting of paddy nor an attempt to cut them on the part of Singheshwar or the members of his party. In the result, I arrive at the conclusion that the acts of appellants Jadu Gope and Sundar Gope are completely justified by right of private defence of property. They are, therefore, acquitted of the charge and I direct that they be set at liberty at once. Dorik, as I have shown above was justified by right of private defence of property to inflict any bodily injury short of death, but under the circumstances of this case, his right did not extend to voluntarily causing the death of Singheshwar. I have no doubt that he had no intention to kill Singheshwar, but must be taken to have the requisite knowledge that his act was likely to cause death. I, therefore, alter his conviction from one under s. 302, Penal Code, to a conviction under s. 304, Part II, Penal Code. His sentence of transportation is, therefore, reduced to a sentence of four years' rigorous imprisonment. The appeal of Jadu Gope and Sundar Gope is allowed and that of Dorik is dismissed subject to the above modification.

Das J. — I have had the advantage of reading the judgment proposed to be delivered by my learned brother. As to Jadu Gope and Sundar Gope, I am in agreement with what my learned brother has said. As to appellant Dorik Gope, I am inclined to place more reliance on the evidence of Raghu Nonia (P. W. 11), particularly when another prosecution witness has admitted that Raghu Nonia was present at the time of the occurrence. Raghu Nonia had stated that he saw the fighting from a distance, and both sides were using their weapons. He further stated that about 40 men were on the side of Singheshwar and about 100 on the other side, and both parties were armed with lathis, ballams, bhalas, etc. The evidence of Raghu Nonia, taken with the evidence of the doctor (D. W. 5) who examined the injuries on Bhulku Gope and Dhaturi Gope, two of the persons on the side of the accused, tends to show

that the prosecution witnesses minimised the part which they had played in the occurrence. It would appear that the men on the side of Sarabjit were also armed, and had caused injuries to some of the persons on the side of the accused. The real question, therefore, is if Dorik Gope is fully protected by the right of private defence or not. That he had a right of private defence cannot be denied: the question is if he has exceeded that right. I was, at one time, inclined to think that he had not exceeded the right, inasmuch as the men of Sarabjit also came armed with dangerous weapons, and some of them had assaulted Bhulku and Dhaturi. My learned brother has, however, taken the view that Dorik Gope gave the bhala blow on Singheshwar in circumstances which did not give rise to any apprehension of grievous hurt to Dorik or any person on his side. Under s. 105, Evidence Act, the burden of proving the existence of such circumstances as would fully protect Dorik Gope is on the accused person, and the Court shall presume the absence of such circumstances. The evidence of Raghu Nonia (P. W. 11) is somewhat weakened by reason of the fact that he admitted in cross-examination that he had not seen the actual fight. Sahdeo Nonia (D. W. 4) who gives the defence version of the occurrence, gave no account of how Singheshwar was assaulted, though he said about the assault on Bhulku and Dhaturi. His evidence, therefore, does not clearly establish any circumstances which would give Dorik Gope the right to assault Singheshwar up to the causing of death.

It was argued before us on behalf of the appellant Dorik Gope that the witnesses who said that Dorik had given the bhala blow to Singheshwar Gope were inimically disposed towards Dorik Gope, because of another case which had been brought by one Pahup Lal Gope against Sarabjit and others only a few days before the present occurrence. Pahup Lal Gope was a bataidar under Dorik Gope. Even then I do not see any good reasons why these witnesses should falsely mention Dorik Gope as the assailant of Singheshwar Gope, if some body else had given the bhala blow. I think that the evidence is clearly to the effect that Dorik had given the bhala blow to Singheshwar. I was, at first, inclined to favour the contention of the appellant that Dorik Gope was fully protected by the right of private defence. After reading the judgment of my learned brother, I do not feel inclined to express dissent from the view which he has taken

regarding the circumstances in which Singheswar Gope was given the bhala blow by Dorik Gope. If there was no reasonable apprehension of grievous hurt, Dorik Gope would not be justified in exercising his right of private defence to the extent of causing death. In 18 P. L. T. 21¹⁸ it has been held that so long as the accused were confronted by an unlawful assembly they were entitled to deal with that assembly as a whole, as long as it continued to be dangerous to them; even if the accused did inflict fatal injuries on members of that assembly, they would be entitled to take all measures necessary for their own safety in case of a dangerous attack on them, and they could not be expected to judge too accurately what was the exact amount of force necessary for that purpose. The principle laid down in that case would not, however, apply if the view of the occurrence is that there was no such attack on Dorik Gope or the members on his side as would give rise to a reasonable apprehension of grievous hurt being caused, if the right of private defence of person or property were not exercised.

N.S./D.H.

Order accordingly.

16. ('36) 23 A.I.R. 1936 Pat. 622 : 166 I. C. 129:
18 P. L. T. 21, Ramsagar Gope v. Emperor.

[Case No. 96.]

A. I. R. (33) 1946 Patna 263

MEREDITH AND RAY JJ.

Jado Prasad and others — Appellants
v.*Jamuna Prasad Singh and others*
— Respondents.

Appeal No. 124 of 1942, Decided on 23rd November 1945, from original decree of Sub-Judge, Monghyr, D/- 27th April 1942.

(a) Contract Act (1872), Ss. 51, 54 and 73—Property mortgaged — Part of property along with other property subsequently sold — Part of consideration left with vendee to pay off mortgage — Vendee not paying off mortgage — Vendee dispossessed of portion of property, by third person later on — Mortgagee obtaining decree for sale—Mortgaged property sold and purchased by mortgagee—Suit by vendor for damages and compensation for breach of contract by vendee — S. 55 (2), T. P. Act, and Ss. 51 and 54, Contract Act, held did not apply — S. 73 held applied and plaintiff was entitled to compensation.

A and his four brothers were members of a Dayabhag family and separate. One of the brothers had died leaving two widows K and P. In 1921 all branches of the family except one mortgaged 23 bighas of land to B. In 1923 all five branches of the family sold 25 bighas of land to C. Out of the mortgaged property 11 bighas of land was in-

cluded in the property sold to C but 14 bighas was not so included. P, however, did not join in the execution of the sale deed although the entire share of her deceased husband was purported to be transferred. Part of the consideration was left with C to pay off the mortgage which they were to do at once or in the immediate future. The vendors in turn were to place C in immediate possession of a portion of the property and in possession of the remainder in 1928. The contract further provided for the possible future contingency that the vendees might be, in whole or in part, dispossessed by reason of some undisclosed defect of title, but, for any such contingency it also set out the remedy of the vendee, namely, a claim for damages and compensation against the vendors. These provisions were expressly set out in the contract. C failed to pay off the mortgage as a result of which the mortgagee obtained a decree for sale on the mortgage and purchased the mortgaged property and obtained possession thereof in 1937. The result was that by the failure of C to carry out the terms of the contract A's family was dispossessed of 14 bighas of land which was not included in the mortgage. A brought a suit for damages and compensation for breach of contract in respect of loss of his share of property. At the time of sale in favour of C, P's share was under attachment and was sold in execution later on and C was dispossessed of that share in 1928. C, therefore, relied upon S. 55 (2), T. P. Act, read with Ss. 51 and 54, Contract Act, in his defence :

Held (1) that S. 55 (2), T. P. Act, had no application to the case, as there was a contract to the contrary :

[P 266 C 1]

(2) that the obligation laid upon C under the terms of the contract to pay off the mortgage was wholly independent of any subsequent dispossession of C which might eventuate, and for which the remedy was expressly and independently provided. The contract, therefore, was not at all the sort of contract contemplated in S. 51, Contract Act :

[P 266 C 2]

(3) that S. 54, Contract Act, also had no application as the contract did not provide that the performance of one portion should be dependent upon the performance of the other, for there was no promise of the vendors upon the performance of which the payment of the mortgage money to the mortgagee was made to depend ;

[P 266 C 2 ;
P 267 C 1]

(4) that the suit was really one under the provisions of S. 73, Contract Act, and the plaintiff was entitled to compensation for any loss or damages caused to him by C's breach of the contract.

[P 267 C 1]

(b) Contract Act (1872), S. 54 — Sale of property—Part of consideration left with vendee to pay off mortgage by vendor — At time of sale vendor failing to put vendee in possession of very small proportion of property—Still vendee cannot refuse to redeem mortgage (*Obiter*).

A mortgage cannot be split. It has to be redeemed as a whole or not at all. Where a property is sold and a part of consideration money is left with the vendee to pay off a mortgage executed by the vendor, even if the vendor fails at the time of the sale to put the vendee in possession of a very small proportion of the vendee property, still the vendee would not be entitled, either in equity or upon the actual terms of the contract, to refuse to redeem the mortgage, or to leave an un-

paid amount thereof proportionate to the extent of his failure to get possession. [P 267 C 1]

(c) Contract Act (1872), S. 73 — Breach of Contract — Compensation — Compensation is only for actual loss.

Under the terms of S. 73 the compensation is only for the loss actually suffered and such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach of contract. The section does not give any cause of action unless and until the damage is actually suffered. [P 267 C 2]

Sarju Prasad and Rajani Kant Sinha —
for Appellants.

Dr. J. N. Banerji and G. C. Banerjee —
for Respondents.

Meredith J. — This is an appeal by the defendants 1st party, and arises out of a decision in a suit for damages and compensation for breach of contract. The plaintiff-respondent, Jamuna Prasad, and his four brothers Singhesar Prasad, Benarsi Prasad, Bhagwat Prasad and Lachhmi Prasad were members of a Dayabhad family and separate. The descendants of Singhesar Prasad are defendants 2nd party. Benarsi Prasad died in 1930, leaving only a widow Sukhni, who also died before the suit. Bhagwat Prasad also died, leaving only two widows, Kumode Kumari and Pratima Kumari.

On 15th July 1921, all the branches of the family except Singhesar Prasad's, mortgaged 23 bighas and odd of land for a sum of Rs. 1200 to the defendant 3rd party Purandar Prasad. Subsequently, on 7th October 1923, all five branches of the family sold about 25 bighas of land for a sum of Rupees 3500 to the appellants. Under the terms of the *kebala* a sum of Rs. 1560, the amount then due as principal and interest, was left with the vendee to pay off the above mortgage. The mortgage debt, however, was never paid off by vendee—with the result that a suit was brought upon the mortgage which resulted in a decree and sale. Purandar bought the mortgaged property, and on 14th September 1937, obtained delivery of possession. Out of the mortgaged property about 11 bighas was included in the property sold to the appellants, but 14 bighas and odd specified in sch. IV to the plaint was not so included. The result, therefore, was that as a result of the failure of the defendants 1st party to carry out the terms of the contract the plaintiff's family was dispossessed of this 14 bighas of land. For this loss compensation was claimed.

The suit was originally filed not only by Jamuna Prasad but also by the sons of Lachhmi Prasad, and by Kumode Kumari

one of the widows of Bhagwat Prasad, all as paupers. Jamuna Prasad, however, was alone found to be a pauper, so Kumode Kumari and the sons of Lachhmi Prasad were removed from the category of plaintiff.

Jamuna Prasad claimed compensation, in respect of half the lost property, one-fourth of his own right and one-fourth as reversioner of Benarsi Prasad.

The defence, so far as now material, was, first, that the vendors had not themselves carried out the terms of the contract. Kumode Kumari had executed the sale deed, but nothing was said to the vendees about the existence of Pratima Kumari and she had not joined therein. The vendors purported to transfer the entire share of Bhagwat. In fact, however, at the time one-tenth share of Pratima Kumari was under attachment in execution of a money decree at the instance of one Babu Nand Kishore Lal. As a result the share of Pratima was subsequently sold by auction and passed out of the possession of the appellants. In the written statement it was merely asserted that these properties on being sold on auction were purchased by one Santlal Missir, a farzidar of Bhola Nath Singh, as a result of which several of the properties purchased by defendant 1 under the deed of sale went out of his possession and remained in the possession of the auction-purchaser, and subsequently in possession of the purchaser from the auction-purchaser, no further details being given. Defendant 1, who alone gave evidence for the appellants, was little more definite. He started by saying he had not got possession over the share of Pratima. He went on to say that Babuji purchased the share of Pratima in execution of the decree of Nand Kishore, and that Mosahib Lal, father of Medni, purchased Pratima's share in the said land in that execution. Subsequently, Medni filed a partition suit against him, and took the share of Pratima. In cross-examination he stated that he could not say of which plot Medni dispossessed him. He could not state its boundaries. He was dispossessed of $1\frac{1}{4}$ bighas. He had not seen the *dakhaldehani*. In support of this case, however, documents were filed; Ex. E a writ of delivery of possession of the year 1926 in favour of Santlal Missir against Mt. Pratima Kumari and Kumode Kumari in respect of one-tenth share of Pratima Kumari out of 17 bighas and odd occupancy *nakdi gora jot* land lying in mauza Bhawanandpur Tauzi No. 801, covers more of the *kewala* plots but

there is also Ex. G judgment in a Title Suit No. 101 of 1931 whereby Medni Prasad and Baleshwar Prasad were allowed partition against the appellants in the one-tenth share of Mt. Pratima Kumari said to have been purchased by Medni Prasad in the farzi name of Baleshwar Prasad, on 26th April 1927, who had got into possession thereof by virtue of *dakhaldehani* on 13th December 1928, jointly with the defendants Jado Prasad, etc., (the appellants) who were the purchasers of the remaining share. This judgment is dated 31st August 1932. There is nothing to show if and when a separate patti was carved out in accordance with the direction of the judgment, but there had been a claim for mesne profits and it was ordered that the amount of compensation for mesne profits would be ascertained in a separate proceeding on application being made thereafter. Exhibit H is a decree in Suit No. 101 of 1931, dated 18th January 1936, which shows that the claim related to one-tenth share in Khasra Nos. 128, 78 and 49 comprising in all 11 bighas 13 kathas 17 dhurs which land was transferred under the sale deed (Ex. 2) of 1923, as appears from the schedule thereto. It appears from this decree that the case was compromised for a sum of Rs. 50 presumably on account of the claim for mesne profits, and the decree was merely one awarding that sum to the plaintiff. Thus, what was established was apparently that the transferee of Pratima's one-tenth share of 11 bighas and odd of the vended property got joint possession thereof with the appellants on 13th December 1928. It is to be seen that the very same land was amongst the properties mortgaged to Purander Prasad in 1921 under the mortgage bond (Ex. 1).

In these circumstances the appellants claimed that they were entitled to refrain from carrying out their part of the bargain, and so did not redeem the mortgaged property. I may here note that what the appellants did do appears from the endorsements upon the mortgage bond (Ex. 1). They paid nothing until 1928 when the sum of Rs. 1000 was paid by defendant 1 Jado Prasad. In 1930 three further payments were made of Rs. 50, Rs. 125 and Rs. 150. In 1934 a final payment of Rs. 80 was made, all these payments being marked towards interest.

The appellants took the further defence that the plaintiff's family had not been dispossessed from certain portions of the mortgaged property by reason of Purander's decree, but had previously lost those por-

tions either by sale or mortgage, or in the case of two plots as the landlord stepped in on account of the transfer of non-transferable raiyati holdings.

The learned Subordinate Judge accepted the defendants' case with regard to the last mentioned plots, Nos. 1036 and 692, as the appellants in their capacity of landlords had got possession over those plots by an ejectment suit on the ground of non-transferability of occupancy holdings. He held, the plaintiff entitled to compensation for his half share of the value of the remainder of the 14 bighas and odd. He observed that with regard to the land sold by the plaintiff or other members of his family there had been stipulations in the *kebalas* that in the event of the vendees being dispossessed subsequently the vendors would have to refund the purchase money, and with regard to certain properties which had been mortgaged the plaintiff and his family still held the equity of redemption. He assessed the value of the lands at Rs. 200 per bigha, considerably less than the value placed upon them by the plaintiff. He, therefore, decreed the suit in part with proportionate costs, disallowing interest for the period prior to the institution of the suit.

There has been no cross-appeal, so we are not concerned with the lands in respect of which the claim has been disallowed or the valuation of the lands. Mr. Sarju Prasad for the appellants has argued upon the two defences which I have set out.

Before I deal with his argument, I wish to emphasise one thing. The reason put forward by the appellants for their failure to pay off the mortgage dues is certainly untrue. By that failure the appellants themselves lost about 11 bighas of the vended property. It is impossible to suppose that they would allow all this property to go out of their hands, merely because their vendors had failed to give them a good title to one bigha and odd. Moreover, the understanding between the parties was plainly that the Rs. 1560 left with the vendees should be paid off at once, because otherwise as interest was mounting up it would be insufficient for the purpose. Yet the appellants paid nothing until 1928, when the sum payable had become very much larger, and also they went on paying small sums, though never sufficient, up to the year 1934, years after December 1928, the date of Medni Prasad's *dakhaldehani*. The inference from these circumstances can only be that the real reason for failure to pay was that the appellants

could not raise the money, and was independent of any breach of contract on the part of their vendors. It is also clear that any claim by the appellants with respect to the share of Pratima in the vended properties could only be in respect of the years 1929 to 1937, since prior to the former date they were in enjoyment of those properties, and subsequently to the latter date they had independently lost all interest irrespective of any claim by Medni Prasad.

Turning now to Mr. Sarju Prasad's arguments: upon the first point, he relies upon S. 55 (2), T. P. Act, read with ss. 51 and 54, Contract Act. Section 55 (2) provides that in the absence of a contract with the buyer the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same. It is unnecessary to consider whether under this provision the plaintiff Jamuna Prasad would be deemed to make any such contract with the buyer in regard to the interest of Pratima, who was separate from him though that may be doubted—because S. 55 (2) has no application to the present case, there being a contract to the contrary. In the sale deed (Ex. 2) the vendors in the clearest terms make themselves jointly responsible for any defect of title subsequently discovered. They say:

"The vended property is free and clear from all flaws and incumbrances. Save and except the debts mentioned above, there is no other debt against the said vended property. If, on the contrary, any kind of debt is found to exist against the vended property, the responsibility for the repayment thereof shall rest with the persons and other properties of us, the executants, our heirs and representatives."

The sale deed also itself provides in express terms the remedy for anything of the kind:

"If by the act of us, the executants, or our heirs and representatives, or on any accounts, the vendee is dispossessed of the vended property, in that case, we the executants, our heirs and representatives shall pay the mesne profits and damages from our other properties respectively."

There is a further stipulation in the sale deed that with regard to the 11 bighas and odd of *quaimi jot* land the vendee was to enter into possession only in the year 1935 Fasli (1928) on account of its being transferred under a *sadhua patwa* deed, and we find from the evidence of defendant 1 that some land, which he describes as 8 to 9 bighas, was at the time of his purchase under *sadhua patwa* of the Manjaul Factory. The land, he says, was released by the factory 5 or 6 years after his kebala, and he got possession over it. He says that he did

not know this fact when he took his kebala, which is of course false, as the whole thing is set out in the kebala itself. Thus under the kebala, the appellants were not in any event, to get possession of the occupancy *jot* lands, including the lands with which we are concerned, as opposed to 11 bighas and odd of *kheraji* lands in mauza Bhanwandpur until the year 1928.

Section 51, Contract Act, upon which Mr. Sarju Prasad relies, provides that:

"When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

This section has obviously no application. We are not dealing with reciprocal promises to be simultaneously performed. The vendee was to pay off the mortgage at once, or in the immediate future. He had also to pay off certain other debts for which part of the consideration was left with him, and to pay the balance in cash. The vendors in return were to place the vendees in immediate possession of portion of the property and in possession of the remainder in 1928. It has not been shown that the vendors failed to carry out these promises in all respects. The first breach of the contract was by the vendees.

True, the contract went on to provide for the possible future contingency that the vendees might be in whole or in part dispossessed by reason of some undisclosed defect of title; but for any such contingency it also set out the remedy of the vendees, namely, a claim for damages and compensation against the vendors. These provisions being expressly set out in the contract, the vendees would obviously not be entitled to resort to an entirely different remedy for which the contract did not provide. The contingency did not arise until December 1928, when the share of widow *M* was lost to the vendees, by which time the vendees themselves were already in default.

The obligation laid upon the vendees under the terms of the contract to pay off the mortgage was upon those terms wholly independent of any subsequent dispossession of the vendees which might eventuate, and for which the remedy was expressly and independently provided. The contract was not at all the sort of contract contemplated in S. 51, Contract Act.

Nor has S. 54 any application. That section relates to contracts consisting of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed, until the other has been

performed. The contract with which we are concerned does not provide that performance of the one portion shall be dependent upon the performance of the other, for there was no promise of the vendors upon the performance of which the payment of the Rs. 1560 to the mortgagee was made to depend. On the contrary, this sum of Rs. 1560 was the money of the vendors. It was entrusted to the vendees for a particular purpose, and clearly upon the terms of the contract the vendees had to apply it to that purpose upon the vendors carrying out their immediate promises, which they did by handing over the property. The vendees withheld payment not because of any breach of the terms of the contract by the vendors but for other reasons. They could not be allowed to say that they withheld payment by reason of any default on the plaintiff's part. Had, however, they actually done this it would have been something they were not entitled to do under the contract.

I would go further. The mortgage could not be split. It had to be redeemed as a whole, or not at all. If therefore the vendors had failed at the time of the sale to put their vendees in possession of this very small proportion of the vended property, one bigha and odd out of 25 bighas, the vendees would still not have been entitled, either in equity or upon the actual terms of the contract, to refuse to redeem the mortgage, or to leave an unpaid amount thereof proportionate to the extent of their failure to get possession.

The suit is really one under the provisions of S. 73, Contract Act. This section provides that

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from party who has broken the contract, compensation for any loss or damages caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

This provision is strictly applicable, and in my judgment, the learned Subordinate Judge was right in holding that the plaintiff was entitled to compensation for any loss or damage caused to him by the defendants' breach of the contract. It is true that upon the same provision and indeed under the express terms of the contract, the appellants had a claim for damages against the plaintiff. The appellants, however, in this suit have claimed no set off. Nor could they have done so. The suit was filed in 1941, the dispossession of the appellants was in

1928, and any claim, therefore, was in 1941 long barred by limitation.

I turn now to Mr. Sarju Prasad's second argument. Under the terms of S. 73, the compensation is only for loss actually suffered, and such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. The learned Subordinate Judge was therefore, in my opinion, wrong in holding that the plaintiff could get any compensation in respect of lands which had been sold by him or Mt. Sukhni before 14th September 1937. In respect of such lands the plaintiff or his predecessor Mt. Sukhni had already received full compensation in the purchase price, and no further loss was caused. It may be that the plaintiff may subsequently be sued by his vendees for return of the purchase money. That, however, may or may not happen. If it is a mere contingent liability, and not as yet at least actual loss, Section 73 would give no cause of action in respect thereof, unless and until the damage is actually suffered. No compensation can, therefore, be allowed in the present suit in respect of any such lands, which are covered by the *kebalas* Exs. B, C and D.

Certain *sudbharna* deeds (Exs. 4a to 4d) were also executed in respect of portions of the property. In respect of these, all that is left to the plaintiff is the equity of redemption. That is all he has lost, and consequently the measure of his compensation must be the value of the equity of redemption. This will have to be worked out by the Court below.

In short, I would allow the appeal only to this extent that the plaintiff shall get no compensation in respect of the lands covered by Exs. B, C and D, in respect of the *sudbharna* lands he shall get compensation upon the basis of the value of his share of the equity of redemption. This should be worked out by the learned Subordinate Judge after taking evidence if necessary. A fresh decree should be prepared by the learned Subordinate Judge upon these lines, and should carry costs in proportion to success. As to costs of the appeal, as it has succeeded only to a very minor extent. I consider the appellants should pay the respondents' costs.

Ray J. — I agree.

V.R./D.H. — *Appeal partly allowed.*

Jammu & Kashmir

Srinagar

[Case No. 97.]

A. I. R. (33) 1946 Patna 268

VERMA AND SHEARER JJ.

*Badridas Agarwala—Judgment-debtor
— Appellant*

v.

*Chairman, Dhanbad Municipality —
Respondent.*

Appeal No. 253 of 1944, Decided on 13th November 1945, from appellate order of Dist. Judge, Purulia, D/- 20th May 1944.

Civil P. C. (1908), S. 47 — Validity of decree, question as to, in execution — Suit by Chairman of Municipality attacked as not being by proper person—Objection held merely technical, in circumstances of case — Bihar and Orissa Municipal Act (7 [VII] of 1922), S. 24.

In a suit by the Chairman of a Municipality to recover dues to the committee the defendant appeared and admitted the liability without any objection. In fact, certain payments were also made under the decree. But in a subsequent execution proceeding the defendant objected that the decree was a nullity and incapable of execution as the Chairman was not entitled to sue on behalf of the Municipal Commissioners :

Held that in view of the facts of the case the decision whether under S. 24, Bihar and Orissa Municipal Act, 1922, a Chairman could sue on behalf of the Commissioners was not necessary and even if there was an error in filing the suit by the Chairman, it was of a technical nature and could be disregarded : ('42) 29 A. I. R. 1942 F. C. 14, *Rel. on* ; ('39) 26 A. I. R. 1939 Pat. 236 and ('39) 26 A. I. R. 1939 Pat. 499, *Disting.* [P 270 C 1]

C. P. C. —

('44) Chitaley, S. 47, N. 33.

A. C. Ray — for Appellant.

K. D. Chatterji — for Respondent.

Verma J. — This miscellaneous second appeal arises out of an objection taken by the judgment-debtor under S. 47, Civil P. C., in an execution proceeding. The Chairman of the Dhanbad Municipality brought a suit against the judgment-debtor-appellant. The suit was decreed on admission and then the decree was sought to be executed. The point that succeeded before First Court was that the Chairman of the Municipality had no right to sue ; but the lower appellate Court has held that he was entitled to sue and therefore he has dismissed the objection.

The case has been argued very fully by both the parties, and the point that has been agitated by the learned advocate for the appellant is that as the suit was filed by the Chairman, Dhanbad Municipality, the decree obtained therein was a nullity and, therefore, incapable of execution. In order to appreciate the point of law urged we sent for the original plaint to see what the position actually was, and we find that the plaintiff described therein is "the Chairman,

Dhanbad Municipality, Dhanbad." The facts out of which this suit arose, which have not been questioned before us, appear from the plaint. The defendant took settlement of some municipal stalls in Dhanbad Bazar at Rs. 660 for one year from 1st September 1937 to 31st August 1938. Out of this a sum of Rs. 165 was paid, but Rs. 495 was still due. The plaintiff, therefore, filed the suit for a sum of Rs. 502. As I have noted before, the judgment-debtor admitted his liability and a decree was passed. The decree was for Rupees 502 as principal, and Rs. 67-2-0 as costs. It was payable in monthly instalments of Rs. 8 payable from 28th February 1939. Out of this amount the decree-holder admitted that he had received Rs. 248 and in the present execution proceedings the prayer was for recovery of Rs. 320 odd and costs.

In support of the contention raised on behalf of the appellant, the learned advocate has strongly relied upon two decisions of this Court. The first case on which he relies is reported in 20 P. L. T. 613=A. I. R. 1939 Pat. 236,¹ where after referring to the provisions of S. 12, Bihar and Orissa Municipal Act, Wort J. observed as follows :

"But the real point is that by the section the Commissioners become a legal entity which legal entity is not represented by the Chairman ; although reference is made to the Chairman from time to time in the Act, he is a person who apart from such reference is unknown to the law, is not a legal entity but is merely a person. If the chairman is sued the plaintiff is entitled to relief only against him and that is clearly not the plaintiff's case here. In no sense of the word could he be held to be the representative for the purpose of the proceedings of the Municipal Commissioners and there is no justification on principle or on authority or under the Act itself to entitle a party to seek his relief against the Commissioners by bringing an action against the Chairman. In my judgment it is not merely a mistake of form but it goes to the very root of the action."

The learned Judge then relied upon the decision reported in (1873) 8 Ch. A. 204.² In that decision the learned Judge did not think it necessary to decide whether the word "may" in the sentence "and may by that name sue and be sued," in S. 12, Bihar and Orissa Municipal Act, should be construed as "shall."

The second case upon which the learned advocate for the appellant relies was decided by the same learned Judge. That case is

1. ('39) 26 A. I. R. 1939 Pat. 236 : 182 I. C. 457 : 20 P. L. T. 613, *Kali Prasad v. Badri Narain*.
2. (1873) 8 Ch. A. 204 : 42 L. J. Bk. 56 : 28 L. T. 323 : 21 W. R. 301, *In re Hodges*.

20 P. L. T. 563,³ where Wort J. construed the word "may" in S. 12 of the Act, as equivalent to "shall," and held that the Chairman of the Municipality was not a legal entity nor a corporation sole and therefore was not entitled to sue.

Reference has also been made to the case in (1783) 168 E. R. 229⁴ where it was held that a corporation must prosecute in their corporate name, and that the addition of such name as a description of the persons of which the corporation is composed, is not sufficient in an indictment. The learned advocate has referred to S. 29 of the old Act, which entitled the Chairman of the Municipal Commissioners to file a suit and emphasised the point that the amendment makes it necessary for the Municipal Commissioners as a body corporate to sue or be sued. Relying upon the decision in 4 Pat. L. J. 240,⁵ the learned advocate for the appellant contends that the decree was void and should be ignored.

But it has to be noted that both the decisions of Wort J. reported in 20 P. L. T. 613¹ and 20 P. L. T. 563³ related to cases in which the objections were taken at the trial of the suits themselves. The lower appellate Court has further pointed out that under S. 24, Bihar and Orissa Municipal Act, the chairman of a municipality can exercise the powers of a municipal corporation so long as there was no resolution of the municipal commissioners forbidding him from doing so. Section 24 lays down that

"The Chairman shall, for the transaction of the business connected with this Act, or for the purpose of making any order authorised thereby exercise all the powers vested by this Act in the commissioners : provided that the Chairman shall not act in opposition to or in contravention of any resolution of the commissioners at a meeting, or exercise any power which is directed to be exercised by the commissioners at a meeting."

The provisions of this section were not referred to in the two decisions of this Court in 20 P. L. T. 613¹ and 20 P. L. T. 563.³ It has been urged by Mr. K. D. Chatterji, appearing on behalf of the respondent, that the objection should have been taken during the pendency of the suit when there would have been an opportunity for the respondent to amend the plaint, if necessary, and that the chairman should be presumed to have sued

the appellant as a representative of the commissioners. Although there is S. 12 which says that the municipal commissioners may sue and be sued as municipal commissioners, there is another provision which under certain circumstances permits a person or persons authorized by the Local Government to exercise the powers and carry on the duties of the municipal commissioners. That is S. 386. In a recent decision of the Federal Court in 23 P. L. T. 304⁶ where the suit was filed by the Administrator of the municipality, an objection was raised that it should have been in the name of the municipal commissioners, and their Lordships observed :

"It seems to us that we should be carrying the legal fiction to a needless length if we insisted that even in this state of facts, proceedings must be taken only in the name of the dormant corporation. It has not been disputed that the person competent to take proceedings is the Administrator; and even if the true view should be that he should take proceedings in the name of the Committee, the defect is one purely of a formal character which can be cured by amendment."

On the strength of this decision it is contended on behalf of the respondent that the defect in the present case also should be deemed to be merely formal. He points out that when the parties were before the Court which passed the decree, the appellant never raised the objection and each party understood the real nature of the suit, the objection should not be allowed at this stage. There is a good deal of force in this contention.

In 42 C. W. N. 768⁷ it has been held that when the municipal commissioners appeared and contested the suit throughout, the technical flaw that it was framed as against the chairman of the municipality could be disregarded. Reference has also been made to the decision of this Court in 5 Pat. 128⁸ where it has been held that in a case by or against a railway-company, the proper name under which the company should be sued is the name and style under which it carries on its business, and that if upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the company is the real defendant then the suit may proceed against the company.

3. ('39) 26 A. I. R. 1939 Pat. 499 : 181 I. C. 486 : 20 P. L. T. 563, Kamakhya Narayan Singh v. Hazaribagh Municipality.

4. (1783) 168 E. R. 229, The King v. Patrick and Pepper.

5. ('19) 6 A. I. R. 1919 Pat. 430 : 4 Pat. L. J. 240 : 50 I. C. 529 (F. B.), Jungli Lal v. Laddu Ram.

6. ('42) 29 A. I. R. 1942 F. C. 14 : I. L. R. (1942) Kar. F. C. 34 : I. L. R. (1944) Lah. 373 : 199 I. C. 331 : 23 P. L. T. 304 (F. C.), Administrator, Lahore Municipality v. Daulat Ram.

7. ('39) 26 A. I. R. 1939 Cal. 178 : 181 I. C. 762 : 42 C. W. N. 768, Jogendra Nath Bannerjee v. Tollygunj Municipality.

8. ('26) 13 A. I. R. 1926 Pat. 40 : 5 Pat. 128 : 90 I. C. 680, Radhe Lal v. E. I. Rly. Co., Ltd.

On the facts of the present case it is not necessary to decide whether under S. 24, Municipal Act, the chairman is entitled to sue on behalf of the municipal commissioners. What appears from the fact of this case is that the suit was filed by the chairman of the municipality, the defendant-appellant appeared and without taking any objection admitted his liability. In fact the appellant has paid a certain portion of the dues against him. In that view of the matter, I am of opinion that even if it was an error, it was of a technical nature and may be disregarded. I would, therefore, dismiss the appeal with costs.

Shearer J.—I agree.

D.R.

Appeal dismissed.

[Case No. 98.]

A. I. R. (33) 1946 Patna 270

MEREDITH AND RAY JJ.

Shyamnandan Sinha and others —

Decree-holders — Appellants
v.

Naurangi Singh and others —

Judgment-debtors — Respondents.

Appeal No. 370 of 1944, Decided on 28th November 1945, from appellate order of Sub-Judge Monghyr, D/- 10th August 1944.

(a) Civil P. C. (1908), O. 21, R. 86—Claim by decree-holder auction-purchaser to set off decretal amount against purchase money allowed — Failure to pay excess amount of one pie held no ground for setting aside sale.

A decree-holder auction-purchaser's application to set off the decretal amount against the purchase money was allowed but the decree-holder failed to deposit in Court under O. 21, R. 85 the excess amount of purchase money which was only one pie. The lower Court held that this was a ground for setting aside the sale under O. 21, R. 86:

Held that the sale should not have been set aside on such ground and the case was covered by the maxim *de minimis non curat lex*. [P 271 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 22 — Decree for rent against two brothers A and B tenants of holding—On B's death during execution his sons brought on record as majors though in fact minors — Notices issued under O. 21, R. 22 against sons as majors—On refusal by A to accept notices they were pasted on house—Subsequent sale of holding — Held service of notices on sons was only irregular and did not render sale void—Failure to appoint guardians for minor sons though serious irregularity did not affect jurisdiction of Court to sell holding.

During execution proceedings of a rent decree against two brothers A and B, who were recorded tenants of a holding, the latter died and the eldest of B's three sons appeared through his uncle A as guardian and asked to be substituted as B's legal representative. But on the decree-holder's application all the three sons of B were substituted as majors though in fact they were minors and notices

under O. 21, R. 22 were issued against them, the evidence being that the processes were presented to A who was the eldest member and karta of the family and on his refusal to accept them were hung up on the walls of the dwelling house. The holding of the judgment-debtors was subsequently sold. The question was whether the sale was nullity or only voidable:

Held that the case was not one of failure to serve notice under O. 21, R. 22. The service upon the adult male member of the family was good under O. 5, R. 15. The fact that notice was served upon the sons as majors though in fact they were minors was at most an irregularity which did not go to the root of the jurisdiction: (34) 21 A. I. R. 1934 Pat. 274, *Rel. on.* [P 271 C 2]

Held further that the failure to bring the two sons of B on the record in the proper manner i. e., without appointment of any guardian, though a serious irregularity did not render the sale without jurisdiction. The decree-holder was entitled to proceed with the execution against A the surviving recorded tenant and to bring the holding to sale. The sale was not therefore a nullity: 25 Bom. 337 (P. C.) and 30 Cal. 1021 (P. C.), *Ref.* [P 272 C 1]

C. P. C. —

(44) Chitaley, O. 21, R. 22, N. 7, Pt. 5.

(41) Mulla, p. 786 'Irregular service of notice.'

Sarju Prasad — for Appellants.

K. N. Lall — for Respondents.

Meredith J. — This is a decree-holders' second appeal against an order of reversal setting aside the sale, in an application under O. 21, R. 90, Civil P. C., read with S. 47 of the Code. The application was filed on the usual grounds, alleging fraudulent suppression of processes in the execution proceeding, fatal material irregularities in publishing and conducting the sale, and in consequence a sale at a grossly inadequate price to the injury of the judgment-debtors. The application was not made until more than two years after the sale, but the applicants alleged that owing to the fraudulent suppression of processes by the decree-holders they knew nothing about the sale, which took place on 19th August 1941, until they heard of it for the first time from one Ram Lakhan Mander with whom the disputed land was said to have been settled by the decree-holders, on 9th September 1943.

The decree was a rent decree against two brothers, Daroga Singh and Jamuna Singh. Daroga died during the execution proceedings, and thereafter applicant 1, the eldest of Daroga's three sons (who are now the applicants), appeared through his uncle Jamuna Singh as guardian and asked that he should be substituted as his deceased father's legal representative. Thereafter, on the decree-holders' application, the three sons of Daroga were substituted, but for some reason, as majors, not minors, and notice under O. 21, R. 22, Civil P. C., was

served upon them as majors, the evidence being that the processes were presented to Jamuna Singh, the eldest member and *karta* of the joint family, and on his refusal to accept them or give a receipt they were hung up on the wall of the dwelling house.

The learned Munsif held upon all points against the applicants, and refused to set aside the sale. On appeal the learned Subordinate Judge did not go into the merits of the application under O. 21, R. 90, except to the extent of holding that the price fetched was in fact inadequate. He held that the application must succeed as one under S. 47 because of two fatal defects, with which I shall presently deal. He held that as the sale was a nullity the application would be governed not by Art. 166, Limitation Act, but by Art. 181, and was consequently within time.

The fatal defects upon which the learned Subordinate Judge proceeded were, first, what I have already mentioned that Daroga Singh, the father of the applicants, having died the applicants were substituted as majors, and no guardian was appointed on their behalf. This, he said relying upon *Bachoo Prasad Singh v. Gobardhan Das* (A.I.R. 1940 Pat. 62¹), rendered the sale without jurisdiction and a nullity.

The second defect was that according to the calculation of the learned Subordinate Judge, based on the record of the execution case, he found that the decree-holders' dues amounted to Rs. 1656-6-3½ and not rupees 1656-6-6½ as noted by the office in the account prepared on the back of the execution petition. The property was sold for Rs. 1656-6-4½, and the decree-holders filed a petition for setting off their dues against the purchase money which was allowed. But as the dues were only Rs. 1656-6-3½ and the purchase money was Rs. 1656-6-4½ there remained an excess of one pie out of the purchase money, which could not be set off and so remained unpaid. The sale, therefore, should be set aside in accordance with the provisions of O. 21, R. 86, Civil P. C.

With regard to the second point I am not at all satisfied that the learned Subordinate Judge's calculation is correct to half a pie as he assumes. It seems probable that he had not included all the expenses of the decree-holders to date. But assuming that there was a deficit of one pie, a coin which I understand is no longer available the

learned Subordinate Judge's view seems to me a case of failing to temper technicality with commonsense, or, as Sir George Rankin once put it, "piling technicality upon unreason (?)." The maxim *de minimis non curat lex* is sufficient to dispose of this contention.

The first needs more serious consideration. Mr. K. N. Lall for the respondents has argued, in the first place, on the basis of the Full Bench case, *Ajab Lal Dubey v. Hari Charan Tewari* (A. I. R. 1945 Pat. 1²), that as there was failure to serve the notice under O. 21, R. 22, the entire sale was without jurisdiction. This, however, was not a case of failure to serve the notice. The notice was certainly served and the service, as the learned Munsif, has observed, was a good service upon an adult male member of the family under O. 5, R. 15, Civil P. C. The service was merely irregular, as the notice was served upon these applicants as majors whereas they were in fact minors. But served it was and there was at most an irregularity, not an absence of service. The case is similar to the case of *F. E. Chrestien v. Jaideo Prasad* (15 P. L. T. 273³) where it was held that a mere irregularity in the method of service did not go to the root of jurisdiction. In so far as it held that, this case has not been dissented from in the Full Bench case just referred to, though no doubt it has been distinguished. There, is, therefore, nothing in this point.

Secondly, however, there arises the question what was the effect of failure to bring the applicants on the record in the proper manner; failure to appoint any guardian for them. So far as the applicant Naurangi is concerned, it seems to me that he was properly brought on the record, because he came in on his own application through the guardian selected by him. With regard to the other two, there was certainly a serious irregularity. But would it have the effect of vitiating the entire sale, rendering it a nullity? I think not. Mr. Sarju Prasad has argued on the basis of the Privy Council case, *Walian v. Banke Behari Pershad Singh* (30 Cal. 1021⁴) that this was a mere irregularity. In that case a person had represented the minors in the case as guardian, but had never been appointed as such by the Court. Mr. Sarju Prasad contends

1. ('40) 27 A. I. R. 1940 Pat. 62 : 187 I. C. 492 : 21 P. L. T. 864.

2. ('45) 32 A.I.R. 1945 Pat. 1 : 23 Pat. 528 : 217 I. C. 337 (F.B.).

3. ('34) 21 A.I.R. 1934 Pat. 274 : 13 Pat. 467 : 149 I.C. 828 : 15 P.L.T. 273.

4. ('03) 30 Cal. 1021 : 30 I.A. 182 : 7 C. W. N. 774 : 8 Sar. 512 (P.C.).

that the two minors were sufficiently represented by their elder brother Naurangi and by their uncle Jamuna who was the karta of their joint family, and also one of the recorded tenants, and who was himself a party to the proceedings as a judgment-debtor. It is not necessary to express any opinion at this stage as to the effect of the irregularity with regard to these two minors, and whether it would give them any right to relief. It would not, in my opinion render the sale without jurisdiction. The landlord was certainly entitled to proceed with execution against Jamuna Singh, the surviving recorded tenant, and to bring the holding to sale. In this connection it may be well to recall *Malkarjun's case* (25 Bom. 337⁵) where the Court had wrongly decided that a certain person was the proper legal representative of the deceased judgment-debtor, and it was held that despite the fact that the proceedings were against a person who was not really the proper legal representative, they were not wholly without jurisdiction.

Mr. K. N. Lall has relied upon the case referred to by the learned Subordinate Judge, *Bachoo Prasad Singh v. Gobardhan Das* (21 P. L. T. 864,¹) but that was a case where the objection was taken before the sale had been confirmed. Their Lordships, after referring to *Malkarjun's case*, observed : "This case is different. Here we are not trying after long lapse of time the effect of proceedings which have long ago reached their conclusion in the Court which was seised of them. But we are dealing with a pending case and a sale which has not yet been confirmed."

Clearly this case is distinguishable. The other case relied on is *Mazharul Haq v. Raghuber Singh* (21 P. L. T. 369.⁶) But that case merely lays down what should be done where the objection is made while the execution proceeding is pending, and does not deal with the effect upon a sale which has been held, without the defect having been remedied.

In my opinion, the learned Subordinate Judge was wrong in holding that the sale was a nullity. He has not considered the application upon the merits as one under O. 21, R. 90, and the case must go back to him to be dealt with as such ; to consider the allegations of fraudulent suppression of notices, lack of knowledge, and application of S. 18, Limitation Act, and whether in-

jury has resulted from the irregularities. I would, therefore, remand the case with these observations, and direct that costs should abide the eventual result of the application.

Ray J.—I agree.

K.S./D.H.

Case remanded.

[Case No. 99.]

A. I. R. (33) 1946 Patna 272

SINHA J.

Baldeo Singh and others — Appellants
v.

Niras Singh and others — Respondents.

Second Appeals Nos. 15 and 16 and Civil Revn. Nos. 19 and 20 of 1945, Decided on 8th November 1945, from decision of Addl. Sub-Judge, Monghyr, D/- 9th December 1944.

(a) Civil P. C. (1908), S. 151, O. 41, R. 23, O. 43, R. 1 (u)—Suit disposed of by trial Court in its entirety on statement on special oath — Suit is disposed of on merits and not on preliminary point — Order of remand by appellate Court on ground that two special oaths were necessary to finally adjudicate upon rights of parties — Order of remand is under inherent power and not under O. 41, R. 23 and as such not appealable.

When a suit is disposed of on a particular evidence which has the effect of conclusively proving the facts in controversy between the parties, the suit cannot be said to have been disposed of on a preliminary ground. It may be that elaborate evidence may not be given at such a trial; but, all the same the suit is disposed of on merits. [P 275 C 2].

In a suit for ejectment on ground of encroachment plaintiff agreed that if defendant took special oath in the Court that the disputed property belonged to him, plaintiff would relinquish his claim and if defendant pointed out the land which he claimed out of the disputed land on taking the special oath, the land would be demarcated. The parties were at variance as to whether the plaintiff in his offer intended to put the defendant upon his special oath twice over. The Court of first instance took the view that the special oath was necessary to be taken only once and after demarcating the land, dismissed the suit. The appellate Court took the view that the second special oath on the spot at the time of demarcation was also necessary to adjudicate finally upon the rights of the parties and remanded the case directing that if defendant offered to take a second special oath the suit would be disposed of accordingly after demarcating the land. If he refused case would have to be heard in ordinary course in accordance with law :

Held the order of remand of the appellate Court was under its inherent jurisdiction and not under O. 41, R. 23, inasmuch as the suit was disposed of by the trial Court on merits, and not on a preliminary point. Hence it was not appealable as an order of remand under O. 41, R. 23. Nor was it appealable as a decree as the judgment of the appellate Court had not conclusively determined the rights of the parties. [P 275 C 2].

Held also that by offering to be bound by special oaths of defendant plaintiff could not be said to have submitted his dispute to the arbitration of the

5. ('01) 25 Bom. 337 : 27 I.A. 216 : 2 Bom. L. R. 927 : 7 Sar. 739 (P.C.), *Malkarjun v. Narhari*.
6. ('40) 27 A.I.R. 1940 Pat. 142 : 18 Pat. 761 : 187 I.C. 52 : 21 P. L. T. 369.

defendant. The decision to be given was that of the Court, though based upon evidence which carried with it the effect of conclusive proof: 22 Mad. 172 and ('26) 13 A. I. R. 1926 Mad. 808, *Disting.* [P 277 C 1]

Held further that the High Court could not in the exercise of revisional jurisdiction overrule the conclusions of the lower appellate Court, right or wrong. [P 277 C 1]

C. P. C. —

('44) Chitaley, O. 41, R. 23, N. 3, 22.

('41) Mulla, Page 1186, "Appeal from remand under the inherent power."

(b) Civil P. C. (1908), O. 32, R. 7 — Applicability — Offer to be bound by special oath of any party or witness does not fall under Order 32, Rule 7.

Order 32, Rule 7 has reference to agreements in the nature of settlements of disputes by a compromise. But an offer to be bound by the special oath of a party to the litigation or of a witness giving evidence in the case is not such an agreement as is contemplated by R. 7 of O. 32. Leave of the Court by the guardian ad litem is, therefore, not required under that rule prior to an offer in a suit by the karta of a joint Hindu family in which minors are also joined as plaintiffs: ('39) 26 A. I. R. 1939 Pat. 278 and ('40) 27 A.I.R. 1940 Pat. 59, *Disting.* [P 276 C 1]

C. P. C. —

('44) Chitaley, O. 32 R. 7, N. 2.

('41) Mulla, Page 1027, "Scope of the rule."

(c) Oaths Act (1873), S. 11—Suit by karta of joint Hindu family—Offer by karta to be bound by statement of defendant on special oath — Suit dismissed on statement of defendant on oath—Minor members present on occasions of oath but raising no objection—Minor members are bound by offer of karta and cannot resile from that position.

In a suit for ejectment by a karta of a joint Hindu family, to which minor members of the family were also parties, the karta agreed to abide by the statements on special oaths of the defendant. When the statements of the defendant on oath were recorded by the Court the minor members of the family were present but did not contend that the offer to abide by the oath had been made only by the karta and not by them. The suit was dismissed on the statements of the defendant:

Held that members other than the karta including the minors could not resile from the position taken on the day of offer and were bound by the act of the karta in having agreed to abide by the oath of the defendant, especially when the defendant had accepted the offer and performed his part: ('30) 17 A. I. R. 1930 Cal. 463; 27 Cal. 229 and ('27) 14 A.I.R. 1927 All. 584, *Rel. on.* [P 276 C 1,2]

(d) Oaths Act (1873), Ss. 9 to 11 — Offer by party to be bound by special oath of opposing party—Offer cannot be withdrawn on frivolous grounds when acted upon by other party.

An offer to be bound by the special oath of a particular person once accepted by the person concerned being a party to the suit cannot be withdrawn except on very cogent grounds which, the Court thinks, justifies it in exercising its discretion not to allow the special oath being administered. But the party cannot be allowed to make such an offer, and then to withdraw the same on frivolous

grounds after the other party has accepted it. Such an offer may be withdrawn so long as it has not been accepted by the other party and acted upon: 18 All. 46; 22 Bom. 281; 22 Mad. 234 and ('31) 18 A.I.R. 1931 Cal. 549, *Rel. on.* [P 277 C 2]

L. K. Jha, Girish Nandan Sahay Sinha, Jamuna Pd. Chaudhury and K. P. Shukul
—for Appellants.

Mahabir Pd., B. N. Rai, Kailash Roy, A. C. Roy and Shyamnandan Pd. Singh —
for Respondents.

Judgment. — These second appeals and civil revisions arise out of the same judgment in a single suit for ejectment of the defendants on the ground that they had encroached upon plaintiffs' Plot 842, which is situate contiguous to the defendants' Plots 835 and 840, to the extent of 1 katha 14 dhurs of homestead land in village Ramdiri.

There are nine plaintiffs who are related as follows: Plaintiff 1, Khiro, is the father of plaintiffs 2 to 4, plaintiff 2 being Baldeo; plaintiff 5 is a son of Baldeo, and plaintiff 6 is a son of plaintiff 5; plaintiffs 7 and 8 are the sons of plaintiff 3; and plaintiff 9 is a son of plaintiff 4. Of the plaintiffs 6 to 9 are minors under the guardianship of Baldeo, apparently because Baldeo is the *karta* of the family, though he is not the eldest member thereof. Plaintiffs are, admittedly, members of the joint Hindu Mitakshara family whose *karta* is Baldeo aforesaid. As the suit related to alleged encroachments on different sides of Plot 842 by the adjoining plots of the defendants, a pleader commissioner was appointed to make measurements. He submitted a report, largely in favour of the plaintiffs. At the time of the commissioner's local investigation, the defendants are said to have claimed only 1 katha and 8 dhurs out of the disputed lands as their own property. Hence, it may be said that the plaintiffs' claim in respect of the remaining 6 dhurs was not disputed.

On 23rd May 1944, a petition was filed purporting to be on behalf of the plaintiffs, but signed only by one of them, to the effect that, if the defendant Babu Niras Singh takes special oath by Ganges water, Tulsi and Tamba (copper) in presence of the Court, and states that the disputed property belongs to the defendants, and that the plaintiffs have no concern with the same, the plaintiffs will relinquish their claim, and, if Babu Niras Singh, on going to the land, points out the extent of his land "in the encroached land," after taking special oath in the presence of the Court, the pillars will be fixed accordingly so as to avoid all future

trouble. Babu Niras Singh accepted this offer made by the plaintiffs, and stated on special oath as aforesaid as follows :

"I have taken in my hand Tulsi, Gangajal and a copper coin. The disputed land has been coming in my possession ever since I attained *kosh*, which I did at the age of 15 (his age as recorded is 45 years). The disputed land belongs to me."

Hence, the first part of the promise was fulfilled. But, on going to the spot, the plaintiffs required the said Niras Singh to take special oath again, and then to point out the land which he claimed out of the disputed land as his. It was objected on behalf of Niras that he had already taken the special oath, and made his claim. The learned Munsif, being present on the spot, decided this question in favour of the defendants, and held that it was not necessary to take the special oath for the second time. However, Niras pointed out the land, and the land so pointed out was demarcated on 4th June 1944. In this connection the learned Munsif has recorded the following order :

"Reached the spot at 8-15 A. M. and moved along the disputed line between the lands of the parties. It was verbally moved before me first that Niras Rai should again be made to take a second special oath here on the spot while he indicated the limits of his claim and possession, and I decided, after hearing the parties, that the special oath taken in Court covers and extends to the indication of the limits of defendant's claim, and that the plaintiffs requiring him to repeat the special oath is unwarranted."

It should be noted at this stage that it was never contended at the spot by any of the plaintiffs that the offer to abide by the special oath of Niras Singh had been made by only one of the plaintiffs, and not all of them. On the next day, that is, 5th June 1944, the learned Munsif passed an order to the effect that all that had to be done in pursuance of the plaintiffs' petition, dated 23rd May 1944, relating to the special oath had been done; that the land had been demarcated at the spot in accordance with the statements of Niras; and that nothing further remained to be done in connection with the suit. The suit was, therefore, dismissed with costs.

On 6th June 1944, two petitions were moved in which it was alleged on behalf of the plaintiffs that Baldeo Singh, plaintiff 2, had filed the petition to abide by the special oath of Niras Singh without the knowledge and consent of the other plaintiffs, and that they had not authorised Baldeo Singh to file such a petition in Court. They, therefore, prayed that the case be tried in the ordinary course, and the said petition dated 23rd May 1944, be ignored, as the same had not

been filed on behalf of all the plaintiffs. On the margins of the petitions, the Court had noted that there was no indication on the spot that the other plaintiffs were not associating with plaintiff 2 in the matter of the special oath, and that none of the plaintiffs gave any indication on the spot that Baldeo Singh had been acting without the authority of the other plaintiffs. As to the prayer of the plaintiffs that this unauthorised act of plaintiff 2 should not be acted upon by the Court as an imprudent act of the *karta* of the family, the Court observed that the case had already been disposed of. In effect, the learned Munsif held that the petitions moved on 6th June 1944, were an afterthought, as on the spot none of the plaintiffs challenged the authority of plaintiff 2.

From the decree so passed by the learned Munsif dismissing the suit, two appeals were filed. Title Appeal No. 92 of 1944 was filed on behalf of all the plaintiffs except Baldeo, and Title Appeal No. 93 on behalf of Baldeo, alone. Both the appeals were heard by the learned Subordinate Judge of Monghyr, and disposed of by the same judgment. Before him, it was argued that the learned Munsif was wrong in dismissing the suit in the absence of a second special oath by Niras on the spot; that the judgment of the learned Munsif has not been pronounced in open Court; and that the other plaintiffs were not bound by the petition of 23rd May 1944, by which it was agreed that the suit be decided on the basis of the special oath of Niras Singh. On the first point, the learned Subordinate Judge took the view that a second special oath on the spot at the time of demarcation was also necessary in terms of the petition filed on behalf of the plaintiffs. The Court also held that, in order to finally adjudicate upon the rights of the parties, it was necessary that the second special oath should be taken by Niras. The lower appellate Court, therefore, directed that the case be remanded to the learned Munsif so that, if Niras offered to take the second special oath at the spot within a fortnight from the date of the receipt of the record by the learned Munsif, the suit will be disposed of accordingly after demarcating the land; on the other hand, if Niras refused to take the second special oath at the spot, the learned Munsif will have to hear the case in the ordinary course in accordance with law. On the second point, the lower appellate Court held that, even though the judgment may not have been delivered in open Court, there was no prejudice to either party, and the

judgment was, therefore, not altogether void. On the third point, the learned Subordinate Judge held that Baldeo was the *karta* of the plaintiffs' joint family, and was the next friend of the minor plaintiffs. He also pointed out that the *vakalatnama* filed in the case had been given by Baldeo on behalf of all the plaintiffs. The Court, therefore, held that Baldeo was acting on behalf of all the plaintiffs in the suit, he having filed *haziris* on thirteen occasions and two affidavits on behalf of all of them. The Court below, therefore, overruled the contention raised on behalf of the plaintiffs that Baldeo was not acting in his representative capacity when he made the offer of special oath to Niras Singh. The learned Subordinate Judge also pointed out that it was not the plaintiffs' case that Baldeo Singh, in acting as he did on 23rd May 1944, did so in collusion with the defendants. The petition of 23rd May 1944, had been signed by the pleaders who held authority from all the plaintiffs. He also pointed out that, at the time of the local inspection by the Court and the parties, none of the plaintiffs came forward to repudiate the authority of Baldeo in offering to abide by the special oath of Niras. He, therefore, came to the conclusion that the plaintiffs had approved of the action of Baldeo in filing the petition of 23rd May 1944, and that the petition was apparently for the benefit of all the parties. To the objection of the plaintiffs that the pleaders had no authority under the *vakalatnama* to file a petition binding the plaintiffs by the special oath of Niras Singh, the learned Subordinate Judge has observed that the pleaders did not act on their own initiative, but on the instruction of Baldeo who was present in Court. In the result, he held that all the plaintiffs were bound by the terms of the petition aforesaid. The learned Subordinate Judge allowed the appeal, and remanded the suit as already indicated. From this judgment in the two appeals, two second appeals have been filed, and two applications in revision have also been filed in the alternative.

Mr. L. K. Jha, appearing on behalf of the appellants-petitioners, has vehemently argued, in the first instance, that the special oath offered to Niras made it necessary that it should have been taken not only in Court while he gave his statement in Court, but should have also been repeated at the time he pointed out the lands at the spot, and that, the offer not having been acted upon in full, it was at an end. The second contention is that the offer, not having been made

by all the plaintiffs, but only by Baldeo, is not binding on the whole family. Thirdly, it has been argued that, no express leave having been obtained by the guardian *ad litem* of the minor plaintiffs, the agreement to be bound by the special oath of Niras is wholly void. Fourthly, it was contended that the judgment of the Munsif had not been delivered in open Court, and it was, therefore, wholly ineffective.

Before I deal with these contentions, I should notice the preliminary objection raised on behalf of the respondents-opposite party. Mr. Mahabir Prasad, on their behalf, has contended that no second special appeal lies, inasmuch as the remand order by the Court below was under its inherent jurisdiction, and not under R. 23 of O. 41, Civil P. C. To this contention, it is argued on behalf of the appellants that an appeal lies, because the judgment passed by the lower appellate Court comes within the purview of R. 23 of O. 41 of the Code, inasmuch as, it is argued, this suit had not been disposed of by the trial Court on merits, but on a preliminary point, namely, the special oath of Niras. In my opinion, the preliminary objection is well-founded in law. When a suit is disposed of on a particular evidence which has the effect of conclusive proof of the facts in controversy between the parties, it cannot be said that the suit has been disposed of on a preliminary ground. It may be that elaborate evidence may not be given at such a trial; but, all the same, the suit is disposed of on merits.

The judgment of the lower appellate Court has not conclusively determined the rights of the parties. Hence, it is appealable neither as an order of remand nor as a decree. Under S. 11, Oaths Act (10 [X] of 1873) the evidence given on special oath shall be "conclusive proof" of the matter stated as against the person who had offered to be bound by that oath. Hence, a suit may be disposed of in its entirety on statements made by a person on special oath, if those statements cover the entire controversy between the parties. It may also not cover the entire controversy, and the matters remaining to be dealt with by the Court may have to be decided on other evidence to be adduced by the parties. At this point it is also convenient to point out the nature of the proceedings which ended in the decree in the trial Court. By offering to be bound by the said oath of Niras, the plaintiffs cannot be said to have submitted their dispute to his arbitration. The decision to be given is that

of the Court, though based upon evidence which carries with it the effect of conclusive proof. Hence, the decisions in 22 Mad. 172,¹ relating to a decree based upon an award, or in A. I. R. 1926 Mad. 808,² holding that a decision on estoppel is a decision on a preliminary ground, do not render any assistance to the appellants' contention that the judgment of the Courts below was based on a preliminary ground. On the same considerations, it must also be held that there is no substance in the contention that the minors are not bound by Baldeo's application on the ground that the express leave of the Court had not been obtained by the guardian ad litem to enter into the agreement. Reliance was placed upon R. 7 of O. 32, Civil P. C., in this connection. But that rule has reference to agreements in the nature of settlements of disputes by a compromise; but, as already pointed out an offer to be bound by the special oath of a party to the litigation or of a witness appearing in the case is not such an agreement as is contemplated by R. 7 of O. 32 of the Code. Hence, the decisions of the Division Bench of this Court in 18 Pat. 271³ or in 18 Pat. 708⁴ have no bearing on the present case.

The contention on behalf of the appellants that the other plaintiffs are not bound by the act of Baldeo in having agreed to abide by the special oath of Niras, on the findings recorded by the Courts below, has no legs to stand upon. The lower appellate Court has recorded a clear finding that Baldeo though not the eldest member in the plaintiffs' family, his father, plaintiff 1, being still alive, was not only the karta of the family, but had actually been looking after the whole suit on behalf of the family. As pointed out by the Courts below, at all material times it was Baldeo who had been taking steps in the suit. Neither on 4th June 1944, when the statement of Niras on special oath was recorded by the Court, nor on the next day, when in the presence of the Court Niras pointed out the portion claimed by him out of the disputed land, was any objection taken by any of the plaintiffs that the Court should not proceed to determine the matter on the special oath to Niras. In my opinion, the Courts below are perfectly

justified in their conclusion that the other members of Baldeo's family, finding that their suit was going to be dismissed, or had been dismissed by the Court on the basis of the statements made by Niras on special oath, thought of this argument at the last hour. In such circumstances, the plaintiffs cannot be allowed to resile from the position taken by them on 23rd May 1944, especially when Niras had accepted the offer, and at least in part, had performed his part. In 34 C. W. N. 310⁵ decided by a Division Bench of the Calcutta High Court, the facts were that in the suit there were two adult defendants and two minor defendants, and the petition signed by a pleader, representing the two adult defendants, as also by the guardian ad litem of the minors agreeing to be bound by the special oath of one of the plaintiffs was filed in Court, and the suit was disposed of according to the deposition of the plaintiff on such oath. It also appears that one only of the adult defendants was present in Court when the petition in question was filed. It was held by the Court that, in the absence of fraud or gross negligence on the part of the guardian, the minors were bound by the consent of their guardian, although given without leave of the Court. Their Lordships relied upon the decision in 27 Cal. 229.⁶ It was also held by the Court that a pleader as agent on behalf of his client cannot bring a suit to a close by offering to be bound by the oath of the opposite party in a particular form, but it was quite open to the Court to make an inference from the particular circumstances of the case as regards the fact that there was authority on the part of the pleader because of the presence of one of the adult defendants who evidently had been put forward by the others to take all necessary steps in connexion with the suit. That decision of their Lordships of the Calcutta High Court appears to be on all fours with the facts and circumstances of the present case. The decision of a Division Bench of the Allahabad High Court in 49 ALL. 842⁷ is also in point. It must, therefore, be held that the plaintiffs other than Baldeo, including the minors, are equally bound by the offer made to abide by the special oath of Niras.

It was further contended on behalf of the appellants-petitioners that, assuming that

1. ('99) 22 Mad. 172, Krishnan Chetti v. Muthu Palandi Vacha Makali Tevar.

2. ('26) 13 A. I. R. 1926 Mad. 808 : 95 I. C. 264, Narayanaswami Aiyar v. Venkatarama Aiyar.

3. ('39) 26 A. I. R. 1939 Pat. 278 : 18 Pat. 271 : 183 I. C. 422, Kedar Nath v. Basant Lal.

4. ('40) 27 A. I. R. 1940 Pat. 59 : 18 Pat. 708 : 183 I. C. 799, Umar v. Mahabir Lal Sahu.

5. ('30) 17 A. I. R. 1930 Cal. 463 : 129 I. C. 408 : 34 C. W. N. 310, Mahomed Mahmud v. Behary Lal.

6. (1900) 27 Cal. 229, Sheo Nath Saran v. Sukh Lal Singh.

7. ('27) 14 A. I. R. 1927 All. 584 : 49 All. 842 : 102 I. C. 38, Deoraj Misra v. Mt. Abhai Raji.

the offer had been made on behalf of the entire family by Baldeo, the offer had not been fully accepted, inasmuch as Niras, while making his statement on special oath in Court, stopped short at claiming title and possession in respect of the disputed land for the defendants, but did not further say, as required by the plaintiffs, that the plaintiffs had no concern with the disputed land, and, secondly, because he did not take the special oath at the spot while pointing out the land to be demarcated. So far as the first part of the contention goes, there is no substance in it. When Niras stated that the land was his, and that he had been in possession for more than thirty years, it amounted to saying that the plaintiffs had no concern with the same. It was open to the plaintiffs' lawyer to put the further question to Niras, if he thought that the statement already made by him did not cover the entire ground. When the case goes back to the learned Munsif, as directed by the lower appellate Court, it will still be open to the plaintiffs to put further questions to Niras. As regards the second part of the contention, there was no absolute refusal by Niras to take the second oath. The parties were at variance as to whether the plaintiffs in their offer intended to put Niras upon his special oath twice over. That matter was adjudicated by the Court at the spot against the plaintiffs. It cannot be said that the decision of the learned Munsif was entirely without substance. On a reading of the petition of 23rd May 1944, either view is possible. The Munsif took the view that a special oath was necessary to be taken only once in Court, and not at the spot. The learned Subordinate Judge has taken the other view, namely, that the oath had to be taken on both the occasions. As I have held that no appeal lies to this Court, I cannot interfere with the findings of the learned Subordinate Judge, right or wrong. I cannot, in the exercise of the revisional jurisdiction of this Court, overrule the conclusions of the learned Subordinate Judge. But it was argued on behalf of the appellants-petitioners that, assuming that the second appeals did not lie, the applications in revision are competent, and that the lower appellate Court had no jurisdiction to remand the case for fresh hearing on a fresh opportunity being given to Niras to fully carry out his acceptance of taking the special oath offered by the plaintiffs. It is argued that Niras did not carry out his

part of the agreement in full, and, therefore, under S. 39, Contract Act, the agreement was at an end, and the plaintiffs were, therefore, entitled to withdraw the offer. In this connexion, reliance was placed by counsel for the petitioners on the cases in 4 Cal. 252,⁸ 70 I.A. 35=47 C.W.N. 497,⁹ 25 P.L.T. 14¹⁰ and 18 P.L.T. 652.¹¹ All these cases are authority for the proposition that, where an offer has not been accepted in full, it is open to the offeror to regard the agreement as at an end, and to claim damages for non-performance of the offeree's part in full. But can it be said in this case that the offer has not been accepted by Niras? In my opinion, as soon as Niras accepted to take the special oath, the plaintiffs were bound by their offer to abide by his special oath. He did take that oath in Court. As regards the second oath, the parties were at variance as regards the content of the offer. The Court of first instance decided in favour of the defendants. The lower appellate Court has decided in favour of the plaintiffs, and directed that the learned Munsif after remand will give a fresh opportunity to Niras to comply fully with the terms of his acceptance of the offer. In this connexion, reference may be made to the cases in 18 ALL. 46,¹² 22 Bom. 281,¹³ 22 Mad. 234¹⁴ and 35 C. W. N. 130.¹⁵ These cases are authority for the proposition that an offer to be bound by the special oath of a particular person once accepted by the person concerned being a party to the suit cannot be withdrawn except on very cogent grounds which, in the opinion of the Court, justifies it in exercising its discretion not to allow the special oath being administered. But it is not open to the party to make such an offer, and then to withdraw it on frivolous grounds after it has been accepted by the other party. Such an offer may be withdrawn so long as it has not been accepted by the other party

8. ('79) 4 Cal. 252, *Sooltan Chand v. Schiller*.

9. ('43) 30 A.I.R. 1943 P.C. 34 : I.L.R. (1943) 2 Cal. 213 : I.L.R. (1943) Kar.P.C. 30 : 70 I.A. 35 : 206 I.C. 1 : 47 C.W.N. 497 (P.C.), *Muralidhar Chatterjee v. International Film Co., Ltd.*

10. ('44) 31 A.I.R. 1944 Pat. 3 : 22 Pat. 306 : 211 I. C. 35 : 25 P. L. T. 14, *Sultan Ahmad v. Syed Maksad Husain*.

11. ('37) 24 A.I.R. 1937 Pat. 391 : 170 I.C. 316 : 18 P.L.T. 652, *Secy. of State v. Rajendra Parsad*.

12. ('96) 18 All. 46, *Ram Narain Singh v. Babu Singh*.

13. ('98) 22 Bom. 281, *Abaji v. Bala*.

14. ('99) 22 Mad. 234, *Thoyi Ammal v. Subbaraya Mudali*.

15. ('31) 18 A.I.R. 1931 Cal. 549 : 132 I. C. 682 : 35 C.W.N. 130, *Khan Mohmud v. Syedali*.

and acted upon. It must, therefore, be held that the plaintiffs were not entitled to withdraw the offer in the circumstances of the present case.

As regards the contention that judgment was not delivered by the learned Munsif in open Court after notice to the parties, it is enough to point out that that judgment is no more in existence, having been set aside by the lower appellate Court. The last contention raised on behalf of the petitioners was that the suit should not have been dismissed in its entirety when the defendants did not at any stage claim six dhurs out of the disputed lands for themselves, and, therefore, the defendants should be taken to have admitted the plaintiffs' claim in respect thereof. Mr. Mahabir Prasad on behalf of the respondents pointed out that Niras had deposed that the disputed land was his; but apparently by the "disputed land" he meant the land claimed by the defendants. Hence, the suit should not have been dismissed in respect of the remaining six dhurs. As the case is to be decided afresh after remand, this aspect will have to be considered by the learned Munsif.

As a result of these considerations, it must be held that all the plaintiffs are bound by the offer to abide by the special oath of Niras, and that there is no error of law or of jurisdiction in the judgment of the learned Subordinate Judge remanding the case for a fresh opportunity being given to Niras to fulfil his part of the agreement by taking the additional oath on the spot, while pointing out the limits of the land claimed by him out of the disputed land. The second appeals are, therefore, dismissed as incompetent, and the applications in revision are also dismissed on the ground that there is no error of jurisdiction in the judgment of the lower appellate Court. The respondents-opposite party are entitled to their costs: hearing fee three gold mohurs in all the cases.

V.B.B.

Appeals dismissed.

[Case No. 100.]

A. I. R. (33) 1946 Patna 278

FAZL ALI C. J. AND PANDE J.

Mt. Ramjhari Kuer and others —

Defendants — Appellants

v.

Deyanand Singh and others —

Plaintiffs — Respondents.

Appeal No. 1267 of 1943, Decided on 25th October 1945, from appellate decree of Addl. District Judge, Patna, D/- 3rd September 1943.

(a) Second appeal — Mixed questions of fact and law.

The proper appreciation of the material documentary evidence in the case and the legal effect of certain important pieces of evidence and proved facts are mixed questions of fact and law which are open to reconsideration by the High Court in second appeal. [P 280 C 1]

C. P. C. —

(144) Chitaley, Ss. 100 and 101, N. 30.

(b) Hindu law — Partition—Cessor of commensality is not conclusive proof of partition.

Cess or of commensality is not a conclusive proof of partition, for a member may become separate in food and residence merely for his convenience. But it is an element which may well be considered along with other acts and transactions of the party concerned. [P 280 C 2]

(c) Hindu law—Partition—Share of member in revenue paying estate not merely specified in record of rights but such member also recorded to be in separate possession over certain plots—This indicates separation.

It is true that the fact that a member's share in a revenue paying estate has been separately defined in the collectorate land registration records and the record of rights, is by itself not conclusive proof of separation but is only a relevant evidence which may be taken into consideration on the question of separation. But where the extent of such member's interest in the estate is not merely specified in the record of rights but such member is also recorded to be in separate possession over certain plots, the entries in the record of rights are of considerable importance indicating separation in the sense of not only definition of shares but also separate possession. Separate possession over properties is a strong piece of evidence to rebut the ordinary presumption of jointness of Hindu family governed by Mitakshara school of Hindu law. [P 280 C 2 ; P 281 C 1, 2]

(d) Admission—Persons jointly interested in subject-matter of suit — Admission by one of them relating to subject-matter of suit is receivable against other.

When several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is made by the defendant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance: (18) 5 A. I. R. 1918 Cal. 971, Ref. [P 282 C 2 ; P 283 C 1]

(e) Hindu law—Partition — Separate monetary dealings of members of family — Evidentiary value.

Separate monetary dealing of the members of the family by itself is not a strong evidence of separation, for different members of the joint Hindu family may have separate monetary dealings. [P 283 C 1]

(f) Hindu law—Partition—Separate mess and residence—Separate transactions — Exclusive possession over part of estate — Separate monetary dealings—Cessation of joint interest may be inferred.

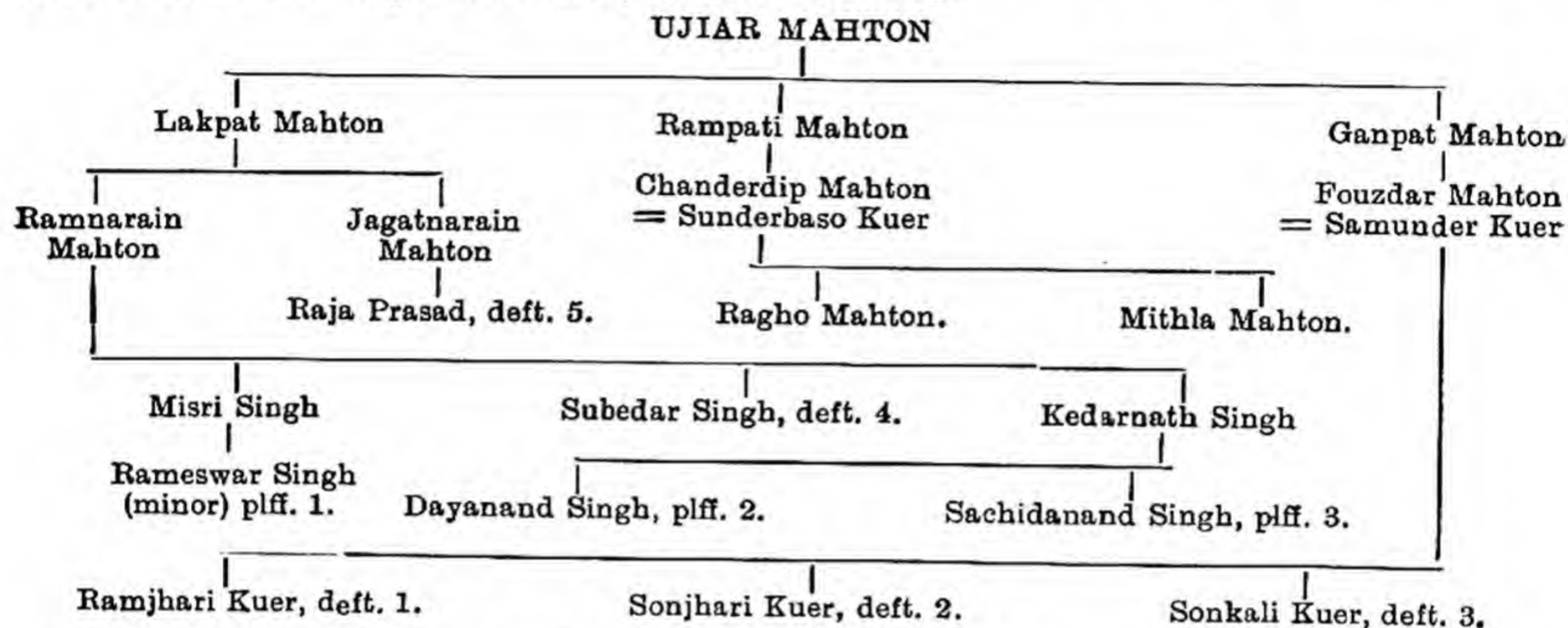
Where a member of Hindu family is separate in residence and mess from the other members, has his separate transactions, has been in possession of some portion of the estate exclusively and has separate funds and monetary dealings from the others these reasonably lead to the inference of cessation of joint interest of such member in the joint family estate. [P 283 C 2]

G. P. Das — for Appellants.

K. Dyal and P. N. Sanyal — for Respondents.

Pande J.—This is an appeal against the decree dated 3rd September 1943, of the

Second Additional District Judge, Patna, which reversed the decree dated 4th February 1942 of the Subordinate Judge, Third Court, Patna. The suit relates to a dispute regarding certain properties of a Hindu family governed by the Mitakshara school of Hindu law. The pedigree given below indicates the relations between the parties and other descendants of the common ancestor, Ujjar Mahton.



The plaintiffs in the suit are descendants of Lakpat Mahton, one of the three sons of Ujjar Mahton. The defendants are daughters of Fouzdar Mahton, grandson of Ujjar by his third son Ganpat Mahton. Fouzdar died in the year 1926 leaving behind him his widow Mt. Samunder Kuer and three daughters who are defendants in the suit. On the death of Fouzdar Mahton a dispute arose between the sons and grandsons of Lakpat Mahton on one side and Mt. Samunder Kuer, widow of Fouzdar, on the other, in land registration proceedings for the mutation of names in place of the deceased proprietor Fouzdar Mahton in respect of certain revenue paying estates which were recorded in the names of Lakpat's descendants and Fouzdar Mahton having certain separate shares. Mt. Samunder Kuer claimed to be mutated in the place of her husband on the ground of separation of her husband from the joint family. Lakpat's sons and grandsons claimed mutation on the allegation that Fouzdar died in state of jointness with them and so his interest in those estates devolved upon them by survivorship. Mt. Samunder Kuer's claim was allowed and her name was mutated in the place of her husband. Lakpat's descendants then instituted a suit for a declaration that they were entitled to the estate of Fouzdar by right of survivorship and for confirmation of possession and in the alternative for

recovery of possession of three zamindari properties in respect of which Mt. Samunder Kuer's name had been mutated. This suit was instituted in the year 1927. During the pendency of the suit Mt. Samunder Kuer died and in her place Fouzdar's three daughters, defendants 1 to 3, were substituted. Ultimately the suit was compromised by which the plaintiffs in the suit recognised absolute right of the daughters to their father's interest in the properties. Rameswar Singh, plaintiff 1, was minor at the time and in the suit he was represented by his grand-uncle Jagatnarain Mahto who, it appears, was the eldest member of the family consisting of Lakpat Mahton's descendants who are admittedly joint. Jagatnarain signed the compromise petition for himself as well as for Rameswar Singh, minor as his guardian. Kedarnath Singh, another plaintiff in the suit, did not sign the petition by his own pen and his signature was made per pen of Misri Singh. Plaintiffs 2 and 3, sons of Kedar were born after the said compromise. In the year 1938 Rameswar Singh and Kedar's two sons, plaintiffs 1 to 3, instituted a suit for setting aside the compromise mainly on the ground that the provisions of R. 7 of O. 32, Civil P. C., had not been complied with. Kedarnath Singh's son also alleged that their father was not a party to the compromise. The principal de-

fendants in the suit were daughters of Fouzdar Mahton and the adult members of the family in Lakpat's branch who had entered into the compromise were impleaded as defendants second party. It may be mentioned here that Kedarnath Singh died sometime between the compromise of the suit and the institution of the suit of 1938. In that suit defendants second party did not enter appearance and the contest was between plaintiffs 1 to 3 on one side and defendants 1 to 3 on the other. The suit was decreed. Thereafter on an application by the decree-holders in that suit the original suit which had been instituted in the year 1927 by the descendants of Lakpat Mahton against Mt. Samunder Kuer was re-opened for hearing between the parties. The main issues in the suit framed by the trial Court were: (2) Was Fouzdar separate from the plaintiffs as alleged in the written statement? (3) Have the plaintiffs their alleged title to the properties in suit?

Both parties produced a large number of documents and examined witnesses in proof of their respective case of jointness or separation. The learned Subordinate Judge on a careful review of documentary and oral evidence came to the conclusion that Fouzdar was separate from the plaintiffs. On this finding the trial Court dismissed the suit. An appeal against the said decree was heard by the Second Additional District Judge. This officer came to a different conclusion and reversed the decree passed by the trial Court, hence this second appeal. Before proceeding to consider the appeal on its merits, it seems necessary to consider in the first instance the contention raised by Mr. Sarju Prasad for the respondents that the question whether a Hindu family is joint or separate is generally a question of fact and the finding of the appellate Court below on the point is not open to re-consideration by the High Court in second appeal. After hearing the arguments of the learned advocates of both sides and on examining the evidence which was referred to in the course of argument we have come to the conclusion that the learned Additional District Judge fell into an error in the proper appreciation of some of the material documentary evidence in the case as well as in regard to the legal effect of certain important pieces of evidence and proved facts. These are mixed questions of fact and law which are certainly open to reconsideration by the High Court in second appeal.

The main question for determination that arises in this appeal is whether Fouzdar Mahton was separate from the family. It is not a case of partition by metes and bounds, nor there is any written instrument in proof of the alleged separation of Fouzdar. In fact the evidence clearly shows that some of the properties are still held jointly. It is really a case of separation by cessation of joint interest indicating intention of the parties to separate. Such intention is to be inferred by acts and conduct of the parties. It is an undisputed fact in the case that Fouzdar had a separate residential house and he was separate in mess from the members of Lakpat branch. Cessor of commensality is not a conclusive proof of partition, for a member may become separate in food and residence merely for his convenience. But it is an element which may well be considered along with other acts and transactions of the party concerned. It is also an undisputed fact in the case that in respect of revenue paying estate held by the descendants of Ujjar Mahton, Fouzdar's share in respect of each of them, or most of them, had been separately defined in the collectorate land registration records. It is also an admitted fact that in the survey record of rights, khewats and khatians, Fouzdar's share in the joint family properties has been separately specified. This by itself is not conclusive proof of separation but it is a relevant evidence which enters into consideration on the question at issue. The inference from such records may be weak or strong according to circumstances. In 47 I. A. 57¹ Lord Shaw who delivered the judgment of the Board observed:

"Records of that character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice, and afford temptation to the manipulation of records, or even of the materials for the first entry."

His Lordship also accorded approval of the Board to the pronouncement of Sir John Edge in 18 ALL. 176²:

"A definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family."

1. (20) 7 A.I.R. 1920 P.C. 46:42 All 368 :23 O.C. 1: 47 I.A. 57 (P.C.), Nageshwar v. Ganesha.

2. (96) 18 All. 176, Gajendar Singh v. Sardar Singh.

If the evidence consisted merely of cesser of commensality in residence and food and definition of shares in revenue papers and record of rights in the case, I should have little hesitation in accepting the conclusion of the learned Additional District Judge, for the evidentiary value of such entries is very slight to establish separation. But it appears that the extent of Foujdar's interest in the lands is not merely specified but in a number of record of rights he is recorded to be in separate possession over certain plots, while members of other branches are recorded to be in the possession of other plots in the holding. Description of boundaries also indicates separate possession over certain plots of members of different branches of the family. There are several such instances. The learned Subordinate Judge has referred to this class of evidence in his judgment in detail. I do not consider it necessary to refer to all such instances. It will be sufficient to refer to some of the instances which definitely indicate separate possession of Foujdar Mahto as also of the members of Lakpat's branch. In Ex. B (18) which is a survey khatian of khata No. 123 the holding is recorded in the name of Lakpat Mahto, Lakpat's father Ujjar Mahto and Foujdar Mahto, but the trees standing on this holding are all entered in the possession of Lakpat Mahto. This entry is wholly inconsistent with the theory of jointness of Foujdar with Lakpat Mahto and his descendants. Exhibit B (3) which relates to bakasht land bearing khata No. 893, possession of members of each of the three branches is recorded over different plots comprised within the holding. The plots in the holding bearing khata No. 920 are entered in the possession of Chanderdip's two sons Ragho and Mithila and three other plots are entered in the possession of Foujdar Mahto and one in the possession of Lakpat Mahto. Exhibit B (5) shows that out of the bakasht bearing khata No. 241 two plots are entered in separate possession of Ragho and Mithila, four other plots in the possession of Foujdar Mahto, three other plots in the possession of Ramnarain Mahto, Lakpat's son, and the remaining other plots are entered in the joint possession of all the descendants of Ujjar Mahto. There are several such entries and it seems unnecessary to multiply such instances. The learned Subordinate Judge has further shown that in the boundaries of certain plots in possession of Lakpat's branch Foujdar's name appears while in the boundaries of

other plots in possession of Foujdar the names of Jagatnarain or other members of Lakpat's branch appear. Residential houses are also recorded in the name of members of different branches separately. The plot number of the residential houses so recorded are specified in the judgment of the learned Subordinate Judge. Therefore, here the entries in the record of rights are of considerable importance indicating separation in the sense of not only definition of shares but also separate possession. Mr. Sarju Prasad realising the weight of this evidence contended that different members of the family may be holding some lands separately for their convenience. But it is not the plaintiffs' case that some lands had been allotted to members of different branches of the family to enable them to meet their expenses. The plaintiffs' case in the pleadings as well as in the evidence has been that all the properties are held jointly by the descendants of the three sons of Ujjar Mahto. Separate possession over properties is a strong piece of evidence to rebut the ordinary presumption of jointness of a Hindu family governed by Mitakshara school of Hindu law.

There is another important piece of document which definitely goes against the plaintiffs' case of jointness of the descendants of all the three sons of Ujjar Mahto. This is Ex. H. It appears that Rampati Mahto died leaving behind him his widow Mt. Sunderbaso Kuer and two sons Ragho Mahto and Mithila Mahto. Ragho and Mithila predeceased their mother. On their death Lakpat's sons and grandsons and Foujdar Mahto applied for mutation of their names in respect of the share entered in the name of Ragho and Mithila in the land registration records of revenue paying estate. Mt. Sunderbaso Kuer objected and asked for mutation of her name in respect of her sons' share in the estates. This was in the year 1919. Eventually the matter was settled by compromise and Mt. Sunderbaso Kuer's name was entered in place of her sons' in respect of touzi Nos. 5023 and 5174. The compromise petition (Ex. H) is signed by each of the adult member of the family per his own pen. The statements contained in para. 1 of this petition are clear declaration of the fact that the petitioners and objector in the land registration proceedings were near agnates and had been living separate and that Mt. Sunderbaso was in separate possession of her sons' separate interest in the properties. The petition then proceeded to state that as Sunderbaso had no issue

left, she agreed that she would not make any alienation or create encumbrance on the properties. The learned Additional District Judge appears to have attached rather undue weight to this part of the statement in the petition and has failed to appreciate the significance of the declaration regarding separation in the very first paragraph of the petition. In my opinion, this document clearly goes against the plaintiffs' case that all the descendants of Ujjar Mahto were living joint.

It has already been stated that all the adult members of Lakpat's branch by the compromise in the suit of 1927 clearly recognised the absolute right of Foujdar's daughters to his estate. It seems hardly likely that Jagatnarain and other descendants of Lakpat should have agreed to such terms, particularly when by the compromise they got nothing out of the Foujdar's estate, had Foujdar not been actually separate from the descendants of Lakpat Mahto. There are a number of documents of the period subsequent to the compromise which show clearly that the defendants in the suit, I mean Foujdar's daughters, have been in separate possession of the properties, *zamin-dari* and *kasht* lands, of their father. There are also some documents which contain clear statement to the effect that Foujdar was separate from the members of Lakpat's branch. The most important of such documents are Exs. N and N (1). Exhibit N is a deposition of Jagatnarain, the eldest member in Lakpat's branch in a suit in which Foujdar's daughters and Lakpat's descendants were opposing parties. Jagatnarain stated: "My business was separate from his (Foujdar). I became the karta of my family after the death of Ramnarain (his brother). Foujdar Singh was karta of his family." Exhibit N (1) is deposition of Raja Prasad Singh who was defendant 5 in the suit and subsequently got himself transposed to the category of the plaintiffs in the present suit. In that deposition also Raja admitted that Foujdar was separate from them. There is another document Ex. G (1) which is a plaint of a suit instituted by Jagatnarain and other members of Lakpat's branch against the defendants for contribution. In that suit also there is a clear statement to the effect that Foujdar was separate from them.

There is another document (Ex. O) which is written statement by Jagatnarain and other members of Lakpat's branch in a suit for rent instituted by Foujdar's daughters

against them. This document also contains similar statement. The learned Additional District Judge seems to be of the view that the admissions contained in these documents were not of any importance as they were made subsequent to the said compromise and that the interest of the adult members who made such admissions were adverse to the minors who got the compromise set aside. There is absolutely nothing in the evidence to show that the interests of the adult members of the family in the joint family estate of Lakpat's branch was in any way adverse to that of their sons and grandsons. It is not disputed that they are all jointly interested in the subject-matter of the suit. The fact that by the compromise the adult members acknowledged the rights of the daughters to the property of Foujdar cannot, in my opinion, be regarded as an act of the adults adverse to the interest of the minor. It is to be noted that the adult members had instituted the suit in 1927 and it was only when the suit was about to be taken up for hearing that the compromise was effected in the year 1930, after three years. The adult members apparently compromised the suit because of the reality of the rights of the daughters and the compromise was a mere acknowledgment of the said rights. The compromise decree has been set aside not on the ground of fraud or of dishonesty of the adult members of the family in entering into the compromise but simply on the ground of omission of a certain legal formality. It is true that Kedar Singh himself did not sign the compromise petition but he never in his life time challenged his assent to the compromise. I can see no circumstance to give any indication that the adult members in entering into the compromise had in any way acted adversely to the interest of the only minor Rameswar Singh, existing at the time. Rameswar's own father Misri Singh himself signed the petition of compromise for himself as well as for Kedar and so did the other adult members of the family. The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the defendant in his character of a person jointly interested with the party against whom the evidence is tendered. The require-

ment of the identity in legal interest between the joint owners is of fundamental importance: 45 Cal. 159.⁵ I have already observed above that Jagatnarain, Raja, Subedar were all jointly interested in the properties in suit along with their sons and grandsons. In fact Raja and Subedar have been transposed to the category of the plaintiffs in the suit along with their sons or grandsons. In my opinion, the admissions in the document referred to and several other documents referred to in detail in the judgment of the learned Subordinate Judge are clear acknowledgment of the fact of Foujdar's separation from the descendants of Lakpat. The admissions are without any qualification. The statement of Jagatnarain, which I have quoted above, is a clear admission of the fact that Foujdar had been living separate from the members of Lakpat's branch who constituted a joint family.

The sale-deed (Ex. 1-D) dated 18th June 1921, shows that certain properties were purchased by Misri and Foujdar and in that deed it was stated that each had moiety (*sic*) interest in the property. It is said that this purchase was made in their names because Jagatnarain was involved in certain litigation of financial liability. That may be an explanation for the transaction in the name of other members of the family than Jagatnarain. But the specification of share of Foujdar and Misri half and half is inconsistent with its being a joint family transaction. The learned Subordinate Judge has referred to a number of mortgage bonds and usufructuary bonds of the period 1911 to 1927. Some of these bonds are in favour of members of Lakpat's branch and some in favour of Foujdar Mahto. The bonds in favour of Foujdar are attested by one or more members of Lakpat's branch, while those in favour of members of Lakpat's branch are attested by Foujdar. Separate bonds so attested in the names of members of two branches of the family give indication of separate monetary dealings of the members of each branch of the family. This, by itself, is not a strong evidence of separation, for different members of the joint Hindu family may have separate monetary dealings, but it certainly indicates that Foujdar had a separate fund. It seems unnecessary to refer to any further evidence in proof of Foujdar's separation. A number of documents have been referred to in some detail in the lengthy judgment of both the trial

and the appellate Courts. The learned Additional District Judge appears to have examined the evidence from the point of partition of the joint family properties by metes and bounds. He went to the length of preparing a schedule of all the lands entered in separate possession of the members of the different branches in the record of rights and in view of inequality in areas in the possession of the members of each branch he seems to have inferred that they could not have separated. I am afraid the learned Additional District Judge fell into an error in his decision as he approached the case from a wrong point of view. The learned Subordinate Judge, on the other hand, appears to have approached the question of separation from the point of cessation of joint interest with intention to separate. This, in my opinion, was the right approach to the case, for, it is not a case of partition by metes and bounds. On a careful examination of the documentary and oral evidence the learned Subordinate Judge arrived at the conclusion that Foujdar was separate in residence and mess from the plaintiffs, he had his separate transactions, had been in possession of some fields exclusively and had separate funds from the plaintiffs. The above findings are, in my opinion, amply supported by the evidence on the record. These findings reasonably lead to the inference of cessation of joint interest of Foujdar in the joint family estate.

I would, therefore, allow the appeal and set aside the decree of the appellate Court and restore the decree of the original Court. Respondents 1 to 3 shall get their costs of the appeal.

Fazl Ali C. J. — I agree. This Court cannot interfere with findings of fact in a second appeal unless they are vitiated by an error of law. In this case the crucial finding arrived at by the Court below does, in my opinion, appear to be vitiated by errors of law. One of these consists in not considering the true effect of Exs. N and N (1) on the ground that these documents came into existence after the compromise in the suit of 1927 and also in not taking into consideration the conduct of the adult male members in entering into the compromise. The question which we had therefore to consider was whether this case should be remanded or this Court should arrive at its own findings upon the materials on the record. As this litigation has been continuing for a long time, we came to the conclusion that it would be subjecting the parties to

3. (18) 5 A. I. R. 1918 Cal. 971; 45 Cal. 159; 41 I. C. 116, *Amhar Ali v. Lutfeali*.

unnecessary harassment by remanding the case to the appellate Court for re-consideration of the evidence and in this light we have examined the evidence and I have no hesitation in agreeing with the conclusions arrived at by my learned brother.

D.S./D.H.

Appeal allowed.

[Case No. 101.]

A. I. R. (33) 1946 Patna 284

FAZL ALI C. J. AND MANOHAR LALL J.

*Bhola Mahton and others—Plaintiffs
— Appellants*

v.

*Mt. Kuer Dei Kuer and others —
Defendants — Respondents.*

Letters Patent Appeal No. 26 of 1944, Decided on 5th December 1945, from decision of Reuben J., D/- 21st August 1944.

(a) Bihar Tenancy Act (8 [VIII] of 1885 as amended in 1939), S. 162A, Proviso 2—Scope—Sale of portion of plot comprised in a holding after amendment, does not convey interest to purchaser.

Proviso 2 to Section 162A, which is inserted by amendment in 1939 applies to sales which had yet to be effected when the amending Act came into force, although the proclamation of sale may have been issued before the section was amended. Hence a sale of a portion of a plot comprised in a holding after the amendment of the section does not convey any title to the auction-purchaser.

[P 285 C 1, 2]

(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 65—Portion of plot in holding purchased by landlord in execution of rent decree—Usufructuary mortgagee from tenant in possession of plot, in his suit for setting aside sale and confirmation of his possession, held could be allowed to redeem charge of landlord purchaser.

In execution of a rent decree a portion of a plot comprised in a holding was purchased by the landlord. This portion was in possession of a usufructuary mortgagee from the raiyat, under an *ijara*. The mortgagee thereupon filed a suit to set aside the sale and for confirmation of his possession and for a consequential relief that the landlord auction-purchaser had no right to actual possession. The trial Court set aside the sale on the ground that the same was invalid by reason of the provisions of S. 162A. On appeal the appellate Court allowed the mortgagee-plaintiff to redeem the charge of the landlord as the plaintiff was willing to do so :

Held that the order of the appellate Court directing the plaintiff to redeem the landlord auction-purchaser by paying up the charges acquired by the latter in execution of the rent decree was correct : ('39) 26 A. I. R. 1939 Pat. 339 (F.B.), *Rel. on.* [P 285 C 2]

Rai T. N. Sahay — for Appellants.

Gokhulanand Prasad — for Respondents.

Manohar Lall J. — This is an appeal from a decision of a learned Single Judge of this Court who has reversed the decision of the learned District Judge in the follow-

ing circumstances : The property of the tenant was put up to sale in 1939. The proceedings in execution of three rent decrees started in that year but the exact date is not clear from the record, but it is clear that the sale proclamation was issued on 9th March 1939. The actual sale was held on 17th May 1939. In that sale .82 acres of land forming a portion of Plot No. 359 appertaining to Khata No. 89 in village Pachaura was purchased jointly by three decree-holders. The delivery of possession was effected on 11th January 1940. It should be observed that between the date of the sale proclamation and the date of sale the Bihar Tenancy Act was amended on 26th April 1939 by which a new provision was inserted in the Act by S. 162A which expressly authorises the sale of a portion of a holding in circumstances prescribed in the section, but it was also enacted by proviso 2 that nothing in this section shall be deemed to authorise the sale of a portion of a plot comprised in a holding. Before the rent decrees were obtained the raiyats had executed an *ijara* on 15th January 1919 of the holding including the plot in question in favour of the plaintiffs who were in possession as such. Another fact that requires to be stated is that the plaintiffs have also acquired *milkiat* and tenancy rights of the tenant judgment-debtors by two sale-deeds dated 25th August 1939 and 7th October 1939. The plaintiffs, therefore, have two capacities, one as *ijaradars* and the other as transferees from the tenants. But, in the meantime, as I have already stated, the sale took place by which the landlords became the auction-purchasers of a portion of the plot on 17th May 1939.

Accordingly the plaintiffs instituted the suit giving rise to this appeal for setting aside the sale which was held on 17th May 1939 on the ground that it was obtained by means of fraud perpetrated on the Court or against the tenants and also for a declaration that the sale had merely the effect of conveying the right, title and interest of the judgment-debtors and for a consequential relief that the landlord auction-purchaser had no right to actual possession. They also sought for a confirmation of their possession.

The learned Munsif held that he could not discover any fraud in the rent decrees which were put in execution, but he held that the proviso to S. 162A, Bihar Tenancy Act, invalidated the sale and therefore the sale must be set aside. Against this decision there was an appeal to the learned District

Judge who relying upon the decision of this Court in 1939 P. W. N. 523¹ came to the conclusion that as the plaintiffs were willing to redeem the charge of the landlord, they should be allowed to do so and passed a decree in these terms:

"In these circumstances the decree of the lower Court will be set aside and in substitution a decree for redemption will be passed on the following terms: An account will be prepared as follows for the purpose of ascertaining the amount payable to the present appellant. They will be entitled to the total amount due under the three execution cases up to the date of sale (17th May 1939) — If the plaintiffs pay the total of these amounts by 31st January 1943 the appellant will be required to hand over the title deed, i. e., the sale certificate and to convey the property to the respondents and to give possession to the respondents (the respondents bearing the cost of the sale-deed). If payment is not made as aforesaid, the plaintiffs' right to redeem will be extinguished."

It was assumed that the sale was a valid sale. Against this decision, there was an appeal to the learned single Judge of this Court who on 31st August 1944 came to the conclusion that the sale of 17th May 1939 had the effect of a rent sale and that even if the purchaser had not taken any action to annul the encumbrances he would take priority over the usufructuary mortgage bond of the plaintiffs and the plaintiffs are not entitled to khas possession. The learned Judge in this Court took the view that the learned District Judge was wrong in granting the relief of redemption to the plaintiffs when they had not sought for that relief in the plaint. There was no appeal by the plaintiffs who thus accepted the position that the sale was valid. In appeal it is argued before us that the learned Judge of this Court was wrong in reversing the decision of the learned District Judge. In my opinion upon a plain reading of S. 162A, Bihar Tenancy Act, it is clear that a portion of a plot comprised in a holding cannot be sold. The language of the section is clear and plain and indeed the learned advocate for the respondent was not in a position to support the judgment of the learned Judge of this Court upon this question. It must, therefore, be held that the sale of a portion of Plot 359 on 17th May 1939 did not convey any interest to the landlord auction-purchaser. The learned advocate, for the respondent, however, argued that as in this case the sale proclamation had already been issued on 9th March 1939, that is to say, before the amending Act came into opera-

tion, it must be held that the sale of a portion of the plot which took place on 17th May 1939 was perfectly valid. I do not agree with this contention. The amending Act will operate and apply to those sales which had yet to be effected. Here, as I have already stated, the sale actually took place on 17th May 1939. When that date was reached, the executing Court should have stayed its hands and refused to sell a portion of the plot as has been expressly enjoined by the Legislature. But the order passed by the learned District Judge appears to be correct as there was no appeal by the plaintiffs against his decision. In following the Full Bench decision of this Court, 1939 P. W. N. 523,¹ he has directed correctly that the plaintiffs will redeem the landlord auction-purchaser by paying up the charges acquired by the auction-purchaser in execution of the decree for rent.

The result is that the appeal is allowed and the decision of the learned single Judge of this Court is set aside and the decision of the learned District Judge is restored. The appellant is entitled to his costs in this Court and the costs incurred before the learned District Judge.

Fazl Ali C. J. — I agree.

N.S./D.H.

Appeal allowed.

[Case No. 102.]

A. I. R. (33) 1946 Patna 285

DAS J.

Gogan Ram — Petitioner

v.

Emperor.

Criminal Revn. No. 1241 of 1945, Decided on 30th October 1945, from order of Addl. Sessions Judge, Bhagalpur, D/- 5th September 1945.

(a) Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order (1944), Cls. 3 and 9 — Prosecution for contravention of — Sanction of Provincial Government is not necessary.

No sanction of Provincial Government is necessary for prosecution for contravention of Cl. 3: (1945) 32 A. I. R. 1945 Pat. 477, *Foll.* [P 287 C 2]

As regards prosecution for contravention of Cl. 9, the considerations which apply to a prosecution under Clause 8, do not apply to one under Cl. 9. Clause 9 refers to orders and directions of a different kind and authority from the orders mentioned in Cl. 19, Cotton Cloth and Yarn (Control) Order (1943) made by the Central Government and they do not cover the same ground. Hence no sanction of the Provincial Government is necessary for a prosecution for contravention of Cl. 9.

[P 288 C 2]

(b) Defence of India Rules (1939), R. 119 — Order of Cloth Controller under Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order (1944) — Rule does not apply.

1. (39) 26 A. I. R. 1939 Pat. 339 : 18 Pat. 676 : 182 I.C. 678 : 1939 P.W.N. 523 (F. B.), *Mahadeo Maharaj v. Jagdeo Singh*.

Rule 119, Defence of India Rules, does not apply to an order or direction issued by the Cloth Controller by virtue of the authority given to him by the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order. The reason is that the order or direction made by the Cloth Controller is not an order made in pursuance of the Defence of India Rules but is an order made by virtue of authority given to him by the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order.

[P 289 C 1]

(c) Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order (1944) — Cloth Controller has power to issue direction to exhibit correct account of stock on notice board.

The Cloth Controller had issued a notification directing all wholesale dealers to exhibit on a notice board from day to day at each of their respective shops or places of business a correct account of the respective stocks of cloth, yarn and standard cloth:

Held that the terms of cl. (a) of sub-r. (2) of R. 81, Defence of India Rules, were wide enough to cover directions of such a nature. The Provincial Government could authorise the Cloth Controller to give such directions to licensees as might be necessary for the purpose of the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order. The direction issued by the Cloth Controller was not illegal.

[P 290 C 1]

(d) Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order (1944), Cl. 3 — Charge defective — Accused knowing case he had to meet with — No prejudice caused — Trial not vitiated.

A person was prosecuted for contravening the provisions of Cl. 3, Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order. The charge framed, however, mentioned that the person contravened the provisions of Cl. 3 by not maintaining the registers of daily transactions. He had maintained the registers but not correctly in accordance with the conditions of his licence :

Held that the defect in the charge was of a very minor nature and had not in any way caused prejudice to the accused. The accused knew full well the case he had to meet, namely, that the registers were incorrectly prepared so that stock in hand was much in excess of the stock actually shown in the registers and the trial was not, therefore, vitiated.

[P 291 C 2; P 292 C 1]

Nageshwar Prasad, G. P. Das and S. C. Mukherji — for Petitioner.

Gopal Prasad — for the Crown.

Order.—The petitioner Gogan Ram has been found guilty of contravening the provisions of cls. 3 and 9, Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944 (hereinafter called the Provincial Control Order for the sake of brevity), and has been sentenced to rigorous imprisonment for six months on each count under R. 81 (4), Defence of India Rules, by the learned Magistrate exercising first class powers at Bhagalpur, which conviction and sentence have been upheld on appeal by the learned Additional Sessions Judge of Bhagalpur. Several questions of law and fact

have been raised on behalf of the petitioner and it is necessary to state the facts of the prosecution case against the petitioner.

The petitioner appears to be the proprietor of a firm, known as Messrs. Gogan Ram Baijnath, dealing in cloth at Bhagalpur. Licenses had been issued to the firm under the Provincial Control Order, and it appears that the firm has two godowns besides a shop. There was a charge against the petitioner that he was keeping a godown at premises other than those mentioned in the license. This charge was found to be not tenable, and does not arise for consideration now. On 4th September 1944, on a certain confidential report received by the District Inspector of Cloth, a raid was made on the shop and godowns of the petitioner. The raiding party consisted of the District Cloth Inspector, other Cloth Inspectors, the Sub-divisional Magistrate and a Sub-Deputy Magistrate. Some of the members of the raiding party went to the shop of the petitioner and others went to the two godowns. Three lists were prepared of the actual stock in the two godowns and at the shop. The petitioner produced four registers as also other papers. As per condition No. 2 of Part I of the license, a register of daily transaction has to be maintained by wholesale and retail dealers, in the form mentioned in condition No. 2, separately for (a) *dhotis* and *saris*, (b) cloth normally sold by yardage, (c) other material sold, e. g., *chaddars*, towels, etc., and (d) yarn by counts in weight. The four registers, which were produced by the petitioner, related to the aforesaid four descriptions of cloth and yarn. The prosecution case is that the stock which was actually found in the shop and the two godowns did not tally with the stock as shown in the four registers mentioned above. Details of the discrepancies have been given in the judgments of the Courts below and I need not repeat those details. It is sufficient to state that except as regards cloth sold by yardage, the actual stock was found much in excess of the stock as shown in the registers in respect of (a) *dhotis* and *saris*; (b) towels, *chaddars*, etc., and (c) yarn. The prosecution case, therefore, is that the petitioner has contravened the provisions of cl. 3, Provincial Control Order, which states that no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence in Form B issued by the Licensing Authority under the order. The gravamen of the charge against the petitioner on the first

count is that though he carried on business under a licence, he did not comply with the terms and conditions of the licence, inasmuch as he had not correctly maintained a register of daily transactions as required by condition 2 of Part I of the Licence in Form B. The charge on the second count arises in the following way. When the shop and godowns of the petitioners were raided on 4th September 1944 it was found that the petitioner had failed to exhibit on a notice board a correct account of the respective stocks of (a) cloth and (b) yarn that might be in the shop or place of business concerned, as required by notification No. 12634-Tex-48/44-P. C., dated 23rd May 1944 issued by the Cloth Controller, Bihar. The aforesaid notification appears to have been issued under the provisions of cl. (9), Provincial Control Order. That clause reads as follows:

"Every licensee shall submit correctly such figures of stocks or transactions and furnish such information as the Controller may prescribe or demand and shall carry out such directions as the Controller may issue from time to time."

By virtue of the authority given to the Cloth Controller under the aforesaid provisions, the Cloth Controller issued the notification in question directing all wholesale dealers to exhibit on a notice board from day to day at each of their respective shops or places of business a correct account of the respective stocks of (a) cloth, (b) yarn and (c) standard cloth. It is stated by the prosecution that the petitioner failed to comply with the aforesaid direction of the Cloth Controller, and thereby contravened the provisions of cl. (9), Provincial Control Order. The defence of the petitioner will appear from the discussion which follows. The main contention of the petitioner was that the stock which was actually in his shop and godowns did tally with the stock as shown in his registers, if all the registers produced by the petitioner were taken into consideration. It is stated that the petitioner produced a fifth register called the "gant" register which was not taken into account in spite of the application of the petitioner. Secondly, it was contended on behalf of the petitioner that he did exhibit on the notice board a correct account of the stock as required by the direction of the Cloth Controller. The Courts below have concurrently found against the petitioner on both points. It would be convenient if some of the questions of law raised on behalf of the petitioner are disposed of at the outset. The first of such questions is if the conviction of the petitioner is bad for want of sanction by

the Provincial Government. This point arises out of certain provisions in the Cotton Cloth and Yarn (Control) Order, 1943, made by the Central Government (hereinafter referred to as the Central Control Order for the sake of brevity and convenience). Clause (23), Central Control Order, states that no prosecution for the contravention of any of the provisions of this order (meaning the Central Control Order) shall be instituted without the previous sanction of the Provincial Government. The position of the Provincial Control Order *vis-a-vis* the Central Control Order, so far as the question of sanction is concerned, has been considered in two decisions of this Court: 24 Pat. 257¹ and 24 Pat. 487.² As far as cl. 3, Provincial Control Order, is concerned there is a definite decision in 24 Pat. 487² that no sanction of the Provincial Government is necessary. It has been pointed out therein that the considerations which apply to cl. 8, Provincial Control Order, do not apply to cl. 3. Clause 8, Provincial Control Order, lays down that no licensee shall sell or offer to sell any cloth or yarn at a price in excess of the maximum price fixed for it. The maximum price referred to in cl. 8, Provincial Control Order, has reference to cls. 10 and 12, Central Control Order. Under cl. 10, Central Control Order, the Textile Commissioner has authority to specify the maximum prices, ex-factory, wholesale and retail, at which any class or specification of cloth or yarn may be sold. Clause 12, Central Control Order, lays down, amongst other things, that no manufacturer or dealer shall sell or offer to sell any cloth or yarn at a price higher than the maximum price specified in this behalf under cl. 10. Therefore, cl. 8, Provincial Control Order, has to be read as supplemental to cls. 10 and 12, Central Control Order. As has been observed in 24 Pat. 487,² the ground covered by the Provincial Control Order in respect of the matter mentioned in cl. 8, Provincial Control Order, is also covered by the Central Control Order, though the latter may be a little more comprehensive in the sense that it applies not only to dealers of different kinds but also to manufacturers. This is one of the grounds on which it was held in that case that a contravention of the provisions of cl. 8, Provincial Control Order, would re-

1. ('45) 32 A.I.R. 1945 Pat. 375 : 24 Pat. 257 : 221 I.C. 426, Kapildeo v. Emperor.

2. ('45) 32 A. I. R. 1945 Pat. 477 : 24 Pat. 487, Manohar Lall v. Emperor.

quire sanction of the Provincial Government in the same way as a contravention of the provisions of any of the clauses of the Central Control Order. It has further been pointed out there that the same considerations do not apply to cl. 3, Provincial Control Order. The Provincial Control Order deals mainly with the question of licensing: it lays down how applications for a licence have to be made; how licences have to be issued by the Licensing Authority; it sets up a machinery for the issue of licences and makes certain provisions for the issue of directions etc., by the Cloth Controller for the guidance of the licensees. The Central Control Order, on the contrary, deals mainly with the fixation of prices, etc., by the Textile Commissioner: it sets up a machinery for the checking of stocks, markings of cloth etc., by the Textile Commissioner through the help of a Textile Control Board and other agencies. It was at one time contended before me that a contravention of any of the provisions of the clauses of the Provincial Control Order would require the sanction of the Provincial Government. Such a contention is, however, clearly negatived by the decision in 24 Pat. 487,² which is a Division Bench decision of this Court and is as such binding on me. Learned counsel for the petitioner has, however, contended that even if a contravention of cl. 3, Provincial Control Order, does not require sanction, a contravention of the provisions of cl. 9, Provincial Control Order, would require sanction. Learned counsel for the petitioner has developed his argument on this point in the following way. He has drawn attention to cl. 19, Central Control Order, and he contends that the provisions of cl. 19, Central Control Order, are more or less the same as the provisions of cl. 9, Provincial Control Order. He contends that as these two clauses cover the same ground, sanction of the Provincial Government would be necessary for a contravention of cl. 9, Provincial Control Order, on the basis of the reasoning adopted in 24 Pat. 487.² In my opinion, this argument which may appear plausible at first sight is really unsound. There is one important distinction between the provisions of cl. 19, Central Control Order, and cl. 9, Provincial Control Order. Clause 19, Central Control Order, does not authorize the Textile Commissioner to give directions from time to time to licensees. As a matter of fact, the Central Control Order does not deal with licensing at all. Clause 19, Central Control Order, merely

authorizes the Textile Commissioner to require any person to give information to enter and search any premises and inspect or cause to be inspected any books or other documents, etc. Clause 9, Provincial Control Order, while giving those powers to the Cloth Controller in respect of licensees, gives a further authority to the Cloth Controller to issue directions to licensees.

It cannot, therefore, be said that cl. 19, Central Control Order, covers the same ground as cl. 9, Provincial Control Order. Then again the two control orders deal with two different authorities — the Textile Commissioner in the case of the Central Control Order and the Cloth Controller in the case of the Provincial Control Order. I do not think it can be said that because a violation of the order of the Textile Commissioner may require a sanction of the Provincial Government for instituting a case on that violation, a violation of the order of the Cloth Controller will require similar sanction, even though the Provincial Control Order does not provide for any such sanction. In my view, the considerations which apply to cl. 8, Provincial Control Order, do not apply to cl. 9, of the said order. Clause 9, Provincial Control Order, refers to orders and directions of a different kind and authority from the orders mentioned in cl. 19, Central Control Order. In this view, no sanction of the Provincial Government is necessary for a contravention of the provisions of cl. 9, Provincial Control Order. The conviction of the petitioner is not, therefore, bad for want of such a sanction.

The next question of law which has been agitated before me is about the application of R. 119, Defence of India Rules. The provincial Control Order was previously published in the Bihar Gazette under Notification No. 652 P. C., dated 14th January 1944. The said Control Order was re-published in an extraordinary issue of the Bihar Gazette on 23rd June 1945, with a notice that the Governor of Bihar was of opinion that publication of notice of the said order in the Bihar Gazette was the manner of publication best adapted for informing persons whom the said order concerned of the terms thereof. But for the recent Full Bench decision in Cri. Revn. No. 869 of 1945³ decided on 11th October 1945, it might have been con-

3. Reported in (1946) 33 A. I. R. 1946 Pat. 1 : 24 Pat. 781 (F.B.), Mahadeo Prasad Jayaswal v. Emperor.

tended with success that the Provincial Control Order was not effective before it was republished on 23rd June 1945, with the notice mentioned above. In view, however, of the recent Full Bench decision mentioned above, it is clear that the contention is no longer available to the petitioners, and the learned counsel for the petitioner has not contended before me that the Provincial Control Order did not become effective before 23rd June 1945. It obviously became effective in January 1944, when it was first published in the Bihar Gazette. This was before the alleged offence in the present case was committed.

Learned counsel for the petitioner has, however, contended before me that as respects the charge on the second count, the direction of the Cloth Controller in Notification No. 12634-Tex-48/44-P. C., dated 23rd May 1944, is hit by R. 119, Defence of India Rules, and as there is no evidence to show in what manner the Cloth Controller had decided that this direction should be communicated to the persons concerned, the direction itself has no legal validity. I am of the view, however, that R. 119, Defence of India Rules, does not at all apply to such a direction of the Cloth Controller. Rule 119 itself makes it clear that it applies to an order in writing made by every authority, officer or person in pursuance of any of these rules. The expression "these rules" obviously means the Defence of India Rules. Now, the order or direction made by the Cloth Controller is not an order made in pursuance of the Defence of India Rules : it is really an order made by virtue of the authority given to him by the Provincial Control Order. The Provincial Control Order is undoubtedly an order under R. 81 (2), Defence of India Rules, and R. 119, Defence of India Rules, applies to the Provincial Control Order. The Cloth Controller has made no order under any of the Defence of India Rules : he has made an order by virtue of the authority given to him by an order made by the Provincial Government under the Defence of India Rules. The order of the Provincial Government made under the Defence of India Rules is hit by R. 119, Defence of India Rules, but not the order made by the Cloth Controller. No case has been cited before me in which it has been held that such an order is hit by R. 119, Defence of India Rules. For example, in the two cases in 24 Pat. 257¹ and 24 Pat. 487² or in the Full Bench decision,³ no argument was raised that the order of the

Textile Commissioner was also hit by R. 119, Defence of India Rules.

Then, there is another aspect of this matter. It has been contended before me that apart from R. 119, Defence of India Rules, it was the duty of the prosecution to prove that the direction of the Cloth Controller was brought to the knowledge of the petitioner, and the petitioner cannot be found guilty unless he knew of the direction. Learned counsel for the Crown has referred to the written statement filed on behalf of the petitioner in which the petitioner had stated that he had complied with the direction of the Cloth Controller by exhibiting on a notice board a correct account of his stock (Ex. A). In view of this plea in the written statement, it is hardly open to the petitioner to say at this stage that he did not know of the direction of the Cloth Controller. It appears that a notice (Ex. A) was found on the notice board by one of the Cloth Inspectors on 6th September 1944, that is, two days after the raid. There is good evidence in the record (which has been referred to by the Courts below) which shows that no such notice was found either at the shop or at the godowns of the petitioner on 4th September 1944. That evidence has been placed before me, and I see no reason to differ from the finding arrived at by the Courts below. Some argument was made before me as to whether a notice of the correct account of the stock was required to be put at the godowns also of the petitioner. The direction contained in Notification No. 1634-Tex/48/44-P. C., dated 23rd May 1944, requires a correct account to be exhibited at each of the respective shops and places of business. Whether a godown is a shop or a place of business may be open to some controversy. It is, however, clear from the evidence that a correct account of the stocks was exhibited neither at the shop nor at the godowns. It, therefore, does not matter very much whether the direction of the Cloth Controller refers only to the shop or to the godowns. In any view of the matter, the petitioner had failed to comply with the direction of the Cloth Controller. I am further of the opinion that in view of the plea taken by the petitioner in his written statement, it cannot be said that he did not know of the direction of the Cloth Controller. It has been contended by learned counsel for the petitioner that his client might not know of the direction of the Cloth Controller before 4th September 1944, and when the raiding party did not see a notice of the

stock, the petitioner might then have known of the direction of the Cloth Controller. The case of the petitioner, however, was that he had put up a notice of the correct account of the stock on 4th September 1944. This case of the petitioner has been disbelieved. This is inconsistent with the present plea of the petitioner that he did not know of the direction of the Cloth Controller. Even if R. 119 applies to the order of the Cloth Controller, I would not be prepared to interfere in revision if it is shown that the petitioner knew of the direction of the Cloth Controller and failed to comply with such direction. As stated above, I am, however, of the view that R. 119 does not apply to the order of the Cloth Controller.

It has been argued before me that it was not legal for the Cloth Controller to give such a direction inasmuch as such an order could not have been made even by the Provincial Government under the provisions of R. 81 (2), Defence of India Rules. Clause (a) of R. 81 (2), Defence of India Rules, allows the Provincial Government to make orders so as to provide for, among other things, regulating the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description. The terms of cl. (a) of sub-r. (2) of R. 81 are wide enough to cover directions of the nature given in this case. Clause (f) of sub-r. (2) of R. 81 allows the Provincial Government to provide for any incidental and supplementary matters. In my opinion, the Provincial Government could authorize the Cloth Controller to give such directions to licensees as might be necessary for the purpose of the Provincial Control Order. The direction given by the Cloth Controller cannot be held to be illegal. I now come to the charge on the first count. It has been contended before me that the finding of the Courts below that the actual stock did not tally with the stock as shown in four registers is an incorrect finding. Firstly, it is pointed out that a fifth register was seized from the petitioner called the "gant" register, and in spite of the application of the petitioner dated 14th July 1945, this register was not taken in evidence. The order of the learned Magistrate, dated 14th July 1945, read as follows :

" Another petition has been filed on behalf of accused Guggon Ram that the stock register of cloth may be taken into evidence. This register has been sent to this Court from the cloth office. Defence will point out the relevancy of the register on the date fixed when the question of its admissibility would be determined."

Thereafter, nothing more appears to have been done to get the entries in the "gant" register brought into evidence. The Court of appeal below has stated that it has looked into the "gant" register, but could not find anything to help the appellant. The question is if the finding of fact arrived at by the Courts below on the question of the discrepancy between the actual stock and the stock as shown in the registers has been vitiated because of the failure to take the "gant" register into account. I have very carefully considered the arguments raised on behalf of the petitioner on this point, and I am unable to agree with the contention that the failure to take into account the "gant" register has vitiated the finding of the Courts below. Under condition 2 of Part I of the Licence, a register of daily transactions has to be kept for four kinds of cloth and yarn. The form in which the register has to be kept is given in the condition itself. If, therefore, any cloth or yarn has been received and brought into the actual stock, it ought to be shown in one of the four registers mentioned in condition 2 of Part I of the Licence. If, however, some cloth or yarn has been received in a bale which has not been opened, the cloth or yarn so received has not actually gone into the stock. The unopened bale so received might have been shown in the "gant" register. It would not, however, make any difference to the actual stock, which should tally with the stock as shown in the four registers mentioned in condition 2. It is obvious that cloth or yarn received in a bale can only be taken into the actual stock when the bale has been opened, and the articles received have been counted: once it is taken into the actual stock, it should be entered in the relevant register as per condition 2 of the Part I of the Licence. I am, therefore, of the view that the "gant" register cannot make any difference. If the goods received had been brought into stock, they ought to be entered in one of the four registers mentioned in condition 2. Therefore, the actual stock, except goods in unopened bales which have not been brought into the stock, should in all cases agree with the stock as shown in the four registers mentioned in condition 2 aforesaid. Moreover, the Courts below have pointed out that the stock as shown in Ex. A, which was hung on 6th September 1944 does not tally with the actual stock found.

Secondly, it has been contended before me that the four registers merely showed the transactions up to the end of 3rd Septem-

ber 1944; transactions of the fourth could only be entered at the end of the day. The raiding party seized the registers before the transactions of the fourth could be completely entered, and this accounts for the discrepancies. This line of argument sounds plausible at first sight. But on careful consideration it appears to me that it is not worthy of acceptance. I have stated above that except with regard to one item, the actual stock was much in excess of the stock as shown by the registers. Such excess cannot be accounted for by sale transaction of the fourth, because sales would reduce the stock and not increase it. Increase of stock can only be explained by receipt of fresh goods. If fresh goods had been received on the fourth and brought into the actual stock, there were no reasons why such receipt should not be entered in the registers. The form in which the register of daily transactions has to be kept contains on the left hand side a column showing receipts, and on the right hand side a column showing sales. If fresh goods had been received on the fourth which had been brought into the stock, the receipt ought to have been shown in the register. The position would be different, as I have observed above, if the goods had remained in unopened bales and had not been brought into the stock. It has been stated in ground No. 4 of the present application in revision that the Cloth Inspector counted the stock of the cloth which was lying in the shop and in open bales in the godowns. It is clear that unopened bales which had not been brought into the stock were not counted in the actual stock, nor could such unopened bales be shown in the registers maintained under condition 2 aforesaid. Unopened bales therefore would not be entered either in the four registers mentioned above or counted in the actual stock. That being the position, it cannot be contended that some goods were received on 4th September 1944, which went into the stock, but were not entered in any of the four registers. The very purpose of the registers would be frustrated if goods are allowed to go into the actual stock without those being entered in any of the four registers. I have also looked into the registers, and I find that in some of them there are entries dated 4th September 1944. It cannot, therefore, be said that the books were written up to 3rd September 1944 only, and that further transactions of the 4th were not entered in the register. Furthermore, this appears to be a new point which was not raised at any earlier stage.

Lastly, it has been pointed out that the three original lists which were prepared on 4th September 1944, have been lost and a consolidated list which was subsequently prepared is the only list on the basis of which the actual stock on 4th September 1944, has been found. It has been contended before me that the consolidated list was not really admissible in evidence. This consolidated list was embodied in the report of the District Cloth Inspector dated 5th September 1944 (Ex. 5). The loss of the three original lists has been proved by P. W. 7 who says that the lists were stolen away from his possession. It appears that these original lists were verified and found to be correct by a Sub-deputy Magistrate (P. W. 6) and they were made over to P. W. 7 for the sale of the articles after they had been seized. The sale continued for sometime, and in the course of those sales, the three original lists appear to have been stolen or lost. The question is whether the consolidated list as given in Ex. 5 is admissible in evidence and is correct. The consolidated list is given in the report of 5th September 1944, the day after the raid. Learned counsel for the petitioner drew my attention to Ss. 63 and 65, Evidence Act, and he has contended that the consolidated list cannot be said to be secondary evidence of the three original lists, and was not, therefore, admissible in evidence. In my opinion, this contention is incorrect. The consolidated list as embodied in Ex. 5 is itself an original document which was prepared to show the sum total of the articles of the three lists. The District Cloth Inspector examined the three lists, and gave the total number of articles in his report (Ex. 5). The stock as shown by the registers has been correctly entered in Ex. 5, and there are no reasons to think that the actual stock as found by counting was not correctly entered in the document. The consolidated list as embodied in Ex. 5 is not really secondary evidence as contemplated in S. 63, Evidence Act, inasmuch as it is not a copy of the three lists. It is an original document which gives the total of the three lists. If the three lists were available, the totals given in Ex. 5 could no doubt be checked with the original lists. But I have no reasons to think that the prosecution is either falsely alleging that the three lists have been stolen or that the totals mentioned in Ex. 5 were not correctly mentioned.

My attention was drawn to a small defect in the charge on the first count. The charge mentioned that the petitioner contravened the provisions of cl. 3, Provincial Control

Order, by not maintaining the registers of daily transactions. The petitioner maintained registers of daily transactions but he did not maintain them correctly in accordance with the conditions of the licence. The defect in the charge is of a very minor nature, and has not in any way caused prejudice to the petitioner. The petitioner knew full well what was the case he had to meet, namely, that the registers of daily transactions were incorrectly prepared so that stock in hand was much in excess of the stock actually shown in the registers.

For the reason given above, I hold that the petitioner has been rightly convicted of contravening the provisions of Cls. 3 and 9, Provincial Control Order, and as such, he has made himself liable to punishment under R. 81 (4), Defence of India Rules. The only other question that remains for consideration is the question of sentence, and learned counsel for the petitioner has contended that there is no evidence that the petitioner had done any black-marketing in respect of the goods in question. The offence, however, is nonetheless serious, inasmuch as incorrect entries in the registers of daily transactions would undoubtedly afford opportunity for profiteering or black-marketing, and it is for the purpose of preventing such evils that the necessity of making correct entries in the registers of daily transaction arises. Considering all the facts and circumstances, I do not think that there are any grounds for interference with the sentence passed in this case. The result, therefore, is that the application fails, and it is dismissed.

G.B./D.H. *Application dismissed.*

[Case No. 103.]

A. I. R. (33) 1946 Patna 292

MEREDITH AND RAY JJ.

Maharaj Singh — Petitioner
v.

Rai Anath Nath Bose—Opposite Party.

Civil Revn. No. 785 of 1944, Decided on 10th January 1946, from order of Munsif, Aurangabad, D/- 1st July 1944.

Bihar Tenancy Act (8 [VIII] of 1885), Ss. 148A and 170 — Suit by cosharer landlord for rent in respect of portion of holding allotted to his share at civil Court partition — Other cosharers not impleaded — Decree obtained in such suit is not rent decree — S. 170 does not bar claim under O. 21, R. 58, Civil P. C., preferred by another cosharer in execution of such decree.

A, a cosharer landlord brought a suit as a sole landlord against a tenant for recovery of his share of rent in respect of the portion of the holding

which was allotted to his share at a Civil Court partition, without impleading the other cosharer landlords. A obtained a decree in execution of which B, another cosharer who had purchased the entire holding in execution of his rent decree obtained prior to the partition suit, preferred a claim under O. 21, R. 58, Civil P. C. The question was whether the claim was barred by S. 170, Bihar Tenancy Act:

Held that the civil Court partition was not binding on the tenant. A's suit against the tenant without impleading the other cosharers was not a rent suit brought in accordance with the provisions of S. 148A, Bihar Tenancy Act, and therefore the decree passed in such suit was not a rent decree but a money decree. Therefore B's claim under O. 21, R. 58, Civil P. C., was not barred by S. 170, Bihar Tenancy Act, as that section only applied to execution of rent decrees and not money decrees: ('35) 22 A.I.R. 1935 Pat. 227, *Approved*; ('33) 20 A.I.R. 1933 Pat. 32, *Foll.*; *Case law discussed.*

[P 293 C 1, 2; P 294 C 2]

A. N. Lal — for Petitioner.

Raj Kishore Prasad — for Opposite Party.

Meredith J.—This case has been referred to a Division Bench by Sinha J. It is a petition by the decree-holder in revision against an order allowing a claim case under O. 21, R. 58, Civil P. C. The ground taken is that the learned Munsif had no jurisdiction to entertain the application because it was barred by the provisions of S. 170 (1), Bihar Tenancy Act.

The facts are as follows. The claimant opposite party obtained a decree against the tenant in Rent Suit No. 1981 of 1935. In this case he had impleaded the cosharer landlords, including the petitioner. He obtained his decree on 10th January 1936, and subsequently, on 25th August 1939, he purchased the holding consisting of 8.27 acres in execution of his decree, and on 31st December 1940, he obtained delivery of possession.

Meanwhile, however, in the year 1937 there had been a civil court partition between the landlords in Suit No. 86 of 1936, and by this partition parts of the holding were allotted to the *takhtas* of different landlords. The petitioner obtained a *takhta* of one anna and odd. Then in the year 1943 he brought a rent suit against the tenant in respect of the portion of the holding allotted to his share for his share of the rent for the years 1347 to 1350 Fasli. He sued as sole landlord, and impleaded none of the other landlords including the opposite party.

The learned Munsif held that the petitioner's decree was not a rent decree as the civil court partition was not binding on the tenants, and the suit was, therefore, by a cosharer landlord in respect of a portion of the holding. Section 170, Bihar Tenancy Act, was not, therefore, applicable to the case.

He accordingly entertained and allowed the claim.

Mr. A. N. Lal for the petitioner urges, first, that the civil court partition had the effect of splitting up the holding, and, therefore, the decree was a rent decree. Secondly even if it was not a rent decree but a money decree, it was not open to the claimant to contend that on that ground S. 170 was not a bar.

On the first point Mr. Lal relies upon a decision of Mullick J., in *Ram Lochan Koer v. Jagernath Misser* (1 Pat. L.J. 270).¹ That learned Judge pointed out that in a partition under the Estates Partition Act the holdings of the tenants can be split up, and he said he could see no difference in that respect between a partition under the Estates Partition Act and a partition in a civil Court. There is, however, if I may say so with respect, a very important difference. In the former case the tenants get notice, in the latter they do not and are no parties to the proceeding. The same question was considered by Khaja Mohammad Noor J. in *Mt. Nepur Kuer v. Bhan Partap* (16 P.L.T. 443).² That learned Judge pointed out that the opinion expressed in *Ram Lochan Koer v. Jagernath Misser* (1 Pat. L.J. 270¹) was an *obiter dictum* as the Judge had held that in fact the tenant had accepted the division of the holding. He went on further to say:

"Before the partition each cosharer has his undivided share extending over the entire holding; after the partition each cosharer holds different pieces of the land comprising the holding in severalty, but the holding is still a holding under all the landlords."

In my view, the decision in 16 P. L. T. 443² was correct. In a subsequent case, *Deo Narain Singh v. Mt. Lila Kuer* (17 P. L. T. 360³) Wort J. while deciding upon the evidence in the case before him that the tenant had accepted the splitting of his holding by payment of the rent to different proprietors, nevertheless expressed agreement with the view taken by Khaja Mohammad Noor J. in 16 P. L. T. 443.² I am decidedly of opinion that so far as the tenant was concerned, the matter was not affected by the civil court partition. The petitioner's suit in which he did not implead his cosharers and did not claim in accordance with the provisions of S. 148A, Bihar Tenancy Act, was not a rent suit.

With regard to the second point, from the wording of S. 170 (1) it would appear to me that what the Legislature intended was to bar the operation of R. 58 of O. 21, Civil P. C., only in cases where the execution is of a rent decree, that is to say, where it is the holding that is being sold, and not the right, title and interest of the judgment-debtor. The wording is:

"Rules 58 to 63 (both inclusive) and 89 of O. 21, Civil P. C., 1908, shall not apply to a tenure or holding or portion of a holding attached in execution of a decree for arrears due in respect of the tenure or holding."

It is significant that whereas the section has been made applicable to a portion of a holding attached in execution of a decree, it is still stated that the arrears must be due in respect of the tenure or holding itself, that is to say, the holding as a whole. Mr. Lal has referred to the decision of Fazl Ali J. (as he then was) in *Dwarka Singh v. Nema Singh* (10 P. L. T. 118).⁴ The learned Judge in that case followed the Full Bench decision of the Calcutta High Court in *Amrita Lal Bose v. Nemai Chand Mukhopadhyaya* (28 Cal. 382).⁵ That decision has been examined and explained by a Division Bench of this Court consisting of Khaja Mohammad Noor and Dhavle JJ. in *Deonandan Prasad v. Pirthi Narayan* (11 Pat. 790).⁶ The learned Judges point out that what was ruled in the Full Bench case was that S. 170, Ben. Ten. Act, barred a claim under S. 278 (O. 21, R. 58), Civil P. C., in all cases where it was shown that the decree was for arrears due in respect of a tenure or holding. They drew a distinction, however, between cases where the claimant attempted to show that the decree was not a rent decree because the suit was against a wrong person and not against the tenant of the holding, and cases where he could show that the decree was not a rent decree at all as the suit had not been properly constituted under the Tenancy Act. Dhavle J. said:

"The question, however, whether the section (S. 170) bars a claim under O. 21, R. 58, when the claimant asserts that the decree under execution was not a rent decree at all, but only a money decree, was not before the Full Bench. The section presupposes a rent decree, and it has been repeatedly held that a claim may be made under O. 21, R. 58, on the ground that the decree is not a decree of the kind presupposed in the section. Claims have, for instance, been allowed where it was shown that the subject-matter of the suit was

1. ('16) 3 A.I.R. 1916 Pat. 79 : 1 Pat. L. J. 270 : 37 I. C. 440.

2. ('35) 22 A.I.R. 1935 Pat. 227 : 156 I. C. 881 : 16 P. L. T. 443.

3. ('36) 23 A.I.R. 1936 Pat. 96 : 160 I. C. 1079 : 17 P. L. T. 360.

4. ('29) 16 A.I.R. 1929 Pat. 195 : 117 I. C. 203 : 10 P. L. T. 118.

5. ('01) 28 Cal. 382 (F.B.).

6. ('33) 20 A.I.R. 1933 Pat. 32 : 11 Pat. 790 : 142 I. C. 40.

not a tenure or holding, or that the decree was not a rent decree because the landlord had brought his suit in respect of more than one tenure or holding, or not being the sole landlord of the tenure or holding, had failed to observe the special provisions of S. 148A without which it was impossible for him to obtain a rent decree (italics mine). . . . It has been contended that he was entitled to show that the decree under execution was not a rent decree, but it is claimed that he was not entitled to show this by establishing that the decree was obtained against a wrong party. That would really be establishing that the decree was a nullity, and establishing it under O. 21, R. 58, which is excluded by S. 170, Ben. Ten. Act."

Mr. Lal has cited a number of other cases, but so far as I can see the propositions laid down in the case just cited have never been dissented from in any case in this Court. The distinction made is a clear one, and in fact so far as I can see there is no conflict of opinion on the point, and so far as this Court is concerned the matter is settled. *Surpat Singh v. Shital Singh* (15 Pat. 614)⁷ is another case on the point. There prior purchasers from the tenants applied under O. 21, R. 58, for release of the holding, and contended that the landlord's decree was only a money decree. The Munsif upheld the contention. It was held in revision that S. 170, Bihar Tenancy Act, was a bar to the application of O. 21, R. 58, but their Lordships explained that the reason why it was a bar was because the tenants did not deny that the decree-holder was the landlord, or that there were actually arrears due for the holding for the years in suit in respect of which the rent decree was passed, but they attacked the decree on the ground that it had been wrongly obtained against the original tenant who had sold the holding to the claimants. They did not dissent from the decision in *Deonandan Prasad v. Pirthi Narayan* (11 Pat. 790),⁸ but rather referred to it with approval.

In *Rani Chhater Kumari Debi v. Bhagwati Prasad* (15 Pat. 812)⁸ the distinction between the two classes of cases was again explained by Khaja Mohammad Noor J. That learned Judge said:

"Generally speaking the position is this. If it can be shown that the decree was not a rent decree a third party can file objections under O. 21, R. 58. For instance, if it appears that the plaintiff is not the 16 annas landlord of the tenure or holding, or that the suit was in respect of a portion of a holding or tenure, or that rents for two or more holdings or tenures had been claimed in one and the same suit, the claim is entertaina-

ble; but if the decree is a rent decree but against a wrong person, the claim is barred. Though sometimes it may be difficult to distinguish between cases in which O. 21, R. 58 is applicable and where it is not, the distinction is there and can be found out for all practical purposes."

The learned Judge went on to refer to the decision of the Privy Council in *Jitendra Nath Ghosh v. Monmohan Ghosh* (34 C. W. N. 821),⁹ which was cited before the Court against the claimant's contention, but the learned Judge pointed out that it was rather in favour of it, and quoted a passage which I should like also to quote:

"In their Lordships' view it is only arrears of rent that are charged by S. 65 upon the tenure, and it is only such arrears that can be realised in execution by the sale of the tenure. Chapter 14 of the Act does not purport to enlarge or restrict the exercise of this right, but only provides the machinery for working it out. If a landlord seeks to use this machinery for the recovery of something that is not rent, to the prejudice of a third party on whom the decree is not binding, it would be a manifest injustice to deny him the right to object, and it would require very clear words in the Act to induce their Lordships to impose this penalty upon him."

Chapter 14 of the Act has now become Chap. 13, Bihar Tenancy Act. It is the chapter in which S. 170 occurs, and it is clear from what their Lordships said that they considered Sec. 170 only applicable to rent execution cases. It is true they were speaking of a suit, but the principle is clearly set out and will obviously be applicable upon the same grounds to an application under O. 21, R. 58.

In my opinion, the present case was not one to which S. 170 provided any bar. The learned Munsif, therefore, had jurisdiction to entertain the claim and decide it upon the merits.

Mr. Lal finally argues upon the basis of *Krishna Chandra Dutta Chowdhury v. Dina Nath Biswas* (54 Cal. 1064)¹⁰ at p. 1073 that the claimant was a representative of the judgment-debtor, and, therefore, his proper remedy was by an application under S. 47, Civil P. C., and not by a claim under O. 21, R. 58. It is not, however, the claimant's case that he is a representative of the judgment-debtor. His case is that he purchased the holding in execution of a previous rent decree. Obviously he could not have been a representative of the judgment-debtor. *Krishna Chandra Dutta Chowdhury v. Dina Nath Biswas* (54 Cal. 1064)¹⁰ was a case with special circumstances where

7. ('36) 23 A. I. R. 1936 Pat. 480 : 15 Pat. 614 : 162 I. C. 805.

8. ('37) 24 A. I. R. 1937 Pat. 278 : 15 Pat. 812 : 169 I. C. 72.

9. ('30) 17 A. I. R. 1930 P. C. 193 : 58 Cal. 301 : 57 I.A. 214 : 126 I.C. 422 : 34 C.W.N. 821 (P.C.).
10. ('28) 15 A. I. R. 1928 Cal. 94 : 54 Cal. 1064 : 107 I. C. 357.

transfer could not be made and was entirely ineffective without the consent of the landlord. The landlord's consent had not been obtained, and the purchasers were held bound by the decree.

In my opinion, the application fails, and I would dismiss it with costs. Costs are assessed at three gold *mohurs*.

Ray J. — I agree.

K.S./D.H. *Revision dismissed.*

[Case No. 104.]

A. I. R. (33) 1946 Patna 295

SPECIAL BENCH

**FAZL ALI C. J., MANOHAR LALL
AND SINHA JJ.**

Province of Bihar—Petitioner

v.

*Maharaja Bahadur Guru Mahadev-
ashram Pratap Sahi, Hathwa —
Opposite Party.*

Misc. Judicial Case No. 72 of 1943, Decided on 9th January 1946; reference by Board of Agricultural Income-tax, Bihar, D/- 8th July 1943.

Bihar Agricultural Income-tax Act (7 [VII] of 1938), S. 25 — Reference under — Assessee alone is entitled to ask for reference to High Court after termination of proceeding under Act—Under S. 25 (1), Board of Agricultural Income-tax can make a reference only during course of pending proceeding—Termination of proceeding under S. 27 — Held reference to High Court was incompetent.

The scheme of the Act indicates clearly that after an assessment has been made or after any proceeding under the Act has terminated, the assessee alone has been given the right under the Act to ask for a reference to the Court under S. 25 (2) in cases where an assessment has been made or a revisional order enhancing the assessment has been passed or it is otherwise prejudicial to the assessee or if a decision by a Board of referees has been made. The assessee can move the Board in other cases under S. 25 (1) and in those circumstances the Board may at its discretion make a reference to the High Court or again in the course of any assessment or in the course of any proceeding under the Act, any agricultural income-tax authority subordinate to the Board may make a reference to the Board for stating the question to the High Court. [P 296 C 2]

The assessee filed an application under S. 27 of the Act before the Agricultural Income-tax Officer praying for relief in respect of certain sums which were assessed to income-tax both under the Bihar Agricultural Income-tax Act as well as under the Income-tax Act. On refusal to grant any relief on this application the assessee appealed to the Commissioner of Agricultural Income-tax who allowed the appeal even though the order refusing relief under S. 27 was not appealable. Some time later the Commissioner of Agricultural Income-tax moved the Board of Agricultural Income-tax to revise his order under S. 24 of the Act. The Board took the view that although the Commissioner's order was illegal it had no power to review it. The

Board thereupon *suo motu* made a reference to the High Court under S. 25 (1) of the Act :

Held that as the assessment proceedings against the assessee had already terminated and there was no pending proceeding under the Act in the course of which the question of law referred to the High Court could arise, the reference was incompetent. Even assuming that the series of incompetent proceedings could be called proceedings under the Act, the proceedings had terminated and, therefore, the Board had no power to move under S. 25 (1).

[P 296 C 2]

Held further that the Act did not provide any remedy in case of mistake of law committed by the income-tax authorities unless a reference was made to the High Court in the course of a proceeding which may be pending either before the first officer or the appellate or revisional officer.

[P 297 C 1]

Advocate-General — for Petitioner.

Baldeva Sahay and B. B. Saran — for Opposite Party.

Manohar Lall J.—This reference by the Board of Agricultural Income-tax, Bihar—hereinafter called the Board—under S. 25 (1), Bihar Agricultural Income-tax Act, 1938—hereinafter referred to as the Act—is made in peculiar circumstances to ask the opinion of the Court whether the order of the Commissioner of Agricultural Income-tax dated 27th October 1942, was illegal. The assessee, Maharaja Bahadur of Hathwa, was assessed on 31st August 1939, by the Agricultural Income-tax Officer for the assessment year 1938-39 on a certain sum which included Rs. 24,475 as representing interest on arrears of rent in the year 1345 Fasli being the previous year for that assessment. For the following year 1939-40, the assessee was assessed by the Agricultural Income-tax Officer on 19th March 1940 for a certain sum including Rs. 18,441 as representing interest on arrears of rent in the year 1346 Fasli. No appeal was preferred against these two orders. An application under S. 27 of the Act was filed by the assessee on 22nd September 1941, before the Agricultural Income-tax Officer inviting his attention to the fact that the same amounts of interest on arrears of rent in the years 1345 and 1346 Fasli have been assessed both by the Agricultural Income-tax Department and by the Indian Income-tax Department. Attention was also drawn to the fact that in the years in question it was not definitely certain whether the questioned amount was taxable under the Agricultural Income-tax Act or under the Income-tax Act. The assessee accordingly prayed that on principles of equity and justice and even under the provision of S. 27 of the Act, the mistake which was apparent on the face of it should be rectified. It was urged that the delay in making the applica-

tion should be condoned, as the matter was not free from doubt and has been cleared only recently by a decision of the Calcutta High Court. By an order dated 7th November 1941, the Agricultural Income-tax Officer declined to give any relief to the assessee as in his view the Madras High Court ruling in 55 Mad. 830¹ was applicable to the case and further

"As assessment for 1938-39, and 1939-40 were made prior to 3rd July 1940, Calcutta High Court ruling also did not apply. This matter is still *sub-judice* and the point has been referred to Patna High Court for decision in the case of *Maharaja-dhiraj of Darbhanga*.* Hence the petition filed cannot come under S. 27."

Against this order an appeal was preferred to the Commissioner of Agricultural Income-tax who, on 27th October 1942, passed this order :

"It has been held in the Full Bench ruling of the Patna High Court in Misc. Judicial Case No. 99 of 1940,² on 1st April 1942, that interest on such rents is but part of the rent, and therefore it does not come within the definition of agricultural income for the purpose of the Bihar A. I. T. Act, 1938. The appellant is therefore entitled to the exclusion of Rs. 24,475 from his income in the year 1345 Fasli and Rs. 18,441 in 1346 Fasli. The appeal is allowed."

It will be noticed that the application under S. 27 of the Act was filed before the Agricultural Income-tax Officer beyond the period prescribed under S. 27 (1) and further that no appeal lay to the Commissioner against an order refusing to grant to the assessee any relief under S. 27. Some time later—the exact date does not appear from the record—the Commissioner of Agricultural Income tax moved the Board to revise the order under S. 24 of the Act passed on 27th October 1942, the letter or the application by the Commissioner to the Board has not also been produced before us. The Board on 17th June 1943 took the view that although the Commissioner's order was illegal, but the Board had no power to review it. It further held that S. 27 of the Act had no application and, therefore, the Agricultural Income-tax Officer was right in rejecting the prayer of the assessee. It also pointed out :

"No revision lay as S. 24 only provides for revision of an order passed on appeal under S. 22 and, as already stated, there was no appeal. The Commissioner . . . made a further mistake by adding the words 'the appeal is allowed.' There was no appeal before him. Even if it had been an appeal

it was long time-barred under S. 22 (2) read with R. 13, but the Commissioner purported to act under S. 24 and under sub-s. (3) of that section any order passed in revision is final subject to a reference to the High Court under S. 25."

It will be observed that the reference to this Court has been made by the Board not at the instance of the assessee but on its own motion. Under S. 25 (1)

"If in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chap. VI (the proceeding under Chap. VI relates to offences and penalties), a question of law arises, the Board may, either of its own motion or on reference from any Agricultural Income-tax authority subordinate to it, draw up a statement of the case and refer it with its own opinion thereon to the High Court."

In the present case the assessment proceedings against the assessee had already terminated and there was no pending proceeding under the Act in the course of which the question of law referred to us could arise. The scheme of the Act indicates clearly that after an assessment has been made or after any proceeding under the Act has terminated, the assessee alone has been given the right under the Act to ask for a reference to the Court under S. 25 (2) in cases where an assessment has been made or a revisional order enhancing the assessment has been passed or it is otherwise prejudicial to the assessee or if a decision by a Board of referees has been made. In these circumstances the assessee and the assessee alone has been given a right under the Act to ask for a reference to the High Court. The assessee can move the Board in other cases under S. 25 (1) and in those circumstances the Board may at its discretion make a reference to the High Court or again in the course of any assessment or in the course of any proceeding under this Act, any agricultural income-tax authority subordinate to the Board may make a reference to the Board for stating the question to the High Court. The learned Advocate-General argued that there was a proceeding here which was started on the application of the assessee under S. 27 and when the Commissioner purported to exercise an appellate power there was a proceeding before him and even if he had no appellate power but purported to exercise a revisional power, there was still a proceeding before him, and, therefore, the requirements of S. 25 (1) have been satisfied. Even assuming that a series of incompetent proceedings could be called proceedings under the Act, the proceedings had terminated and the Board had no power to move under S. 25 (1).

1. ('32) 19 A. I. R. 1932 Mad. 436 : 55 Mad. 830 : 138 I. C. 289 (S.B.), Commr. of Income-tax, Madras v. Rajagopala Venkata Narasimha.

* See ('43) 30 A. I. R. 1943 Pat. 1 (F.B.)—[Ed.]

2. Reported in ('42) 29 A.I.R. 1942 Pat. 435 : 21 Pat. 488 : 202 I. C. 128 (F.B.), Ram Ran Vijay Prasad Singh v. Province of Bihar.

It was argued by the learned Advocate-General that if the Commissioner or the Collector or the Income-tax Officer under the Act makes a mistake in favour of the assessee on a question of law the result would be that there will be no remedy to correct such a mistake. The short answer to this argument is that no such remedy is provided in the Act to the Agricultural Income-tax authorities unless a reference is made to the High Court in the course of a proceeding which may be pending either before the first officer or before the appellate or revisional officers. In my opinion the reference is incompetent, and I would decline to answer the question referred to us. In the circumstances each party will bear his own costs in this Court.

Fazl Ali C. J.—I agree.

Sinha J.—I agree.

K.S./D.H. *Reference rejected.*

[Case No. 105.]

A. I. R. (33) 1946 Patna 297

SPECIAL BENCH

FAZL ALI C. J., MANOHAR LALL
AND SINHA JJ.

Province of Bihar — Petitioner
v.

Hari Bhajan Das — Opposite Party.

Misc. Judicial Case No. 83 of 1941, Decided on 9th January 1946, from order of Board of Agricultural Income-tax, Bihar, D/- 28th August 1941.

Bihar Agricultural Income-tax Act (7 [VII] of 1938), S. 8 — Income actually applied or finally set apart for application to religious and charitable purposes is alone exempt and not whole agricultural income of trust.

In order to claim exemption under S. 8 the assessee must in each year show that he has either applied or finally set apart for application, a certain sum to religious and charitable purposes and only such sum will be exempt from taxation. Merely because the assessee is a trustee holding properties, yielding agricultural income, in trust for religious and charitable purposes, he cannot claim exemption from taxation in respect of the whole of the agricultural income from such properties. [P 297 C 2; P 298 C 1]

Advocate-General—for Petitioner.

N. N. Prasad II—for Opposite Party.

Manohar Lall J. — This is a reference under S. 25 (2), Bihar Agricultural Income-tax Act, (Act 7 [VII] of 1938) by the Board of Agricultural Income-tax, Bihar, for our opinion upon the question whether the assessee is exempt from payment of agricultural income-tax under S. 8 of the Act. The matter came before this Court in 1942 when this Court was unable to express any opin-

1946 P/38 & 39

ion on this question because the case stated did not contain sufficient materials. The case was, therefore, sent back to the Board of Agricultural Income-tax, Bihar, for a further statement. That statement has now been received. The facts are not in dispute. The assessee is the present mahant of an *asthal* which has landed properties yielding agricultural income. The assessee has been found to be a trustee, and the trust under which he holds is a trust created long before the Act came into force and is for public purposes of a charitable and religious nature. For the year 1345 Fasli the assessee has been assessed to agricultural income-tax on Rs. 6229 after allowing for a deduction of Rs. 3500 found to have been spent by him on charitable and religious objects. For the year 1346 Fasli, the assessee has been assessed on a sum of Rs. 6106-8-0 after making a deduction for Rs. 3248 found to have been spent by the assessee on charitable and religious objects. The assessee's contention is that as it has been found he is holding the properties for public purposes of charitable and religious nature, the whole of his agricultural income is free from taxation and not merely the sum found by the agricultural income-tax authorities to have been actually spent for religious and charitable purposes in the two previous years.

In my opinion, this contention is not sound. The provisions of S. 8 (1) of the Act are absolutely clear. It is enacted that where the assessee is a trustee and the trust under which he holds is a trust created before the commencement of this Act, for public purposes of a charitable or religious nature, any income applied, or finally set apart for application, to any public purpose of a charitable or religious nature in accordance with the terms of the trust subject to which he holds the property from which such agricultural income is derived, shall not be included in the total agricultural income of such assessee. It has been found that the assessee has actually applied certain sums towards religious and charitable objects in the years of assessment. That sum has accordingly been deducted from the total agricultural income. The assessee can only claim a further exemption if he could show that any other sum has been finally set apart for application to public purposes of a charitable or religious nature. There is no such finding in the statement of the case nor in any of the orders of the subordinate officers because this was not the case put forward by the assessee. His case on the other hand was—and

the same contention was advanced here by Mr. Nawal Kishore Prasad No. II—that the whole of the income from agriculture has been finally set apart by the donor for religious and charitable purposes. But in order to claim exemption under the Act, the assessee must in each year show that he had finally set apart a sum for charitable and religious purposes. The words used in the Act are “finally set apart.” Take a case of common occurrence. The assessee is in possession of lands yielding Rs. 15,000 per annum as agricultural income which under the terms of the trust he can and must use for religious and charitable purposes. But he may actually use only Rs. 10,000 for religious and charitable purposes, and save the balance for investment in Government securities or in purchasing some land. Can it be said that the sum of Rs. 5000 has been finally set apart in that year for religious and charitable purposes? In my opinion the question admits only of one answer.

Mr. Nawal Kishore Prasad No. II drew our attention to the case of the Judicial Committee in 1944 I.T.R. 482,¹ but that was a case decided upon the terms of S. 4, Income-tax Act, where the relevant provision is that a deduction shall be made if “any income derived from property held in trust or other legal obligation wholly for religious or charitable purposes, and, in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto.” It will be noticed that the words in the Agricultural Income-tax, Act are different and impose a limitation, which under the Income-tax Act is prescribed only in case of properties held in part only for religious or charitable purposes, to income derived from property held wholly for religious or charitable purposes. That case, therefore, is of no assistance to the assessee. In my opinion, the answer to the question is that the assessee in the present case is not exempt from payment of agricultural income-tax under S. 8 of the Act, beyond what he has actually spent on religious and charitable objects consistent with the purpose of the trust. It was suggested that we should call for a finding as to whether the assessee has or has not set apart any sum in these two years for religious and charitable objects, but we are unable to agree to this

suggestion as the assessee has never sought to establish that he had actually set apart in the two years of assessment any sum for religious and charitable objects. If he had raised any such question and furnished materials for its decision, this question would no doubt have been decided properly. The assessee must pay the costs of this reference, hearing fee Rs. 100.

Fazl Ali C. J.—I agree.

Sinha J.—I agree.

N.S./D.H.

*Reference answered
accordingly.*

[Case No. 106.]

A. I. R. (33) 1946 Patna 298

FAZL ALI C. J. AND PANDE J.

*Tahal Mahton and others — Appellants
v.*

Lachoo Mahton and others —

Respondents.

Appeals Nos. 1021 and 1023 of 1942 and 23 and 24 of 1943, Decided on 27th November 1945, from appellate decrees of Sub-Judge, Patna, D/- 25th September 1942.

(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 112A—Tenant applying to Rent Reduction Officer for reduction of rent on allegation that rent was cash and not bhaoli—Order reducing rent confirmed on appeal by Collector — Order set aside by Commissioner and Board of Revenue as being without jurisdiction—Order of Collector having been vacated as being without jurisdiction does not bar civil Court from determining question whether rent was cash or on bhaoli basis.

A tenant alleging that the holding was held on nakdi (cash) rent and not bhaoli rent applied to the Rent Reduction Officer under S. 112A, Bihar Tenancy Act, for reduction of rent. The Rent Reduction Officer passed an order reducing the rent and his order was upheld in appeal by the Collector. In revision the Commissioner set aside the order and his order was upheld by the Board of Revenue on the ground that as the rent was bhaoli the Rent Reduction Officer had no jurisdiction. The tenant instituted a suit for a declaration that the holding was held on nakdi system. The suit was decreed by the Munsif but was dismissed by the Subordinate Judge. On appeal it was contended for the tenant that the order of the Collector upholding the order of the Rent Reduction Officer was final and hence the civil Court had no jurisdiction to come to a contrary finding :

Held that though the order of the Collector in a rent reduction proceedings cannot be interfered with on merits by the Commissioner or Board of Revenue, the Board of Revenue can vacate it if the order is without jurisdiction, in the exercise of its power of superintendence. In this case the order of Board of Revenue in substance was that the Rent Reduction Officer should not have reduced the rent of the holding as he had no jurisdiction to reduce the rent of bhaoli holdings. The order of the Collector in rent reduction proceedings having been vacated by a Court of competent jurisdiction it

1. ('44) 31 A. I. R. 1944 P. C. 88 : I. L. R. (1945) Kar. P. C. 17 : I. L. R. (1945) Bom. 153 : 71 I.A. 159 : 220 I. C. 197 : 1944-12 I. T. R. 482 (P.C.), All India Spinners Association v. Commr. of Income-tax, Bombay.

could not stand in the way of the civil Court coming to its own independent conclusion on the question whether the holding was held on a cash rental or a bhaoli basis : [P 301 C 2]

Held further that as the tenant himself had invited the Courts below to come to a finding on that question in order to grant him the relief prayed he cannot turn round and say that they had no jurisdiction to come to the finding they have arrived at : ('45) 32 A.I.R. 1945 Pat. 179, *Expl.* [P 301 C 2]

(b) Civil P. C. (1908), S. 100 — Question of fact — Question whether holding is on cash rent or on bhaoli basis is one of fact.

The question whether the rent of a holding is on cash basis or bhaoli basis is a question of fact and a finding on the question cannot be disturbed in second appeal. [P 299 C 2]

C. P. C. —

('44) Chitale, Ss. 100 and 101 N. 35.

Baldeo Sahay and C. P. Sinha—for Appellants.

Mahabir Prasad and A. N. Lal —

for Respondents.

Fazl Ali C. J.—These four appeals have been heard together as the point involved in them is identical. Two of the appeals arise out of two title suits and the remaining two arise out of two rent suits. It has been conceded before us that the decision in the title suits on the principal point involved in them will govern the decision in the rent suits.

In order to understand the point involved in the title suits I will briefly refer to the facts set out in the plaint presented in the two suits. The plaintiffs in these suits were admittedly the tenants of two different holdings which are covered by khatas Nos. 312 and 367 of Mauza Akbarpur Asthawan and the defendant-appellants are admittedly the landlords of these holdings. Both the holdings are recorded in the survey khatian as bhaoli, but the case of the plaintiffs is that they were converted into nakdi on 15th Jeth 1336 Fasli by means of an unregistered hukumnama issued by the landlord directing the conversion of the bhaoli rent into nakdi at the rate of Rs. 5 in one case and Rs. 4-8-0 in the other. According to the plaintiffs this nakdi jama became payable from 1337 Fasli onwards and since then they had been paying nakdi rent at the rate stated in the hukumnama. Before the suits were instituted there was a proceeding in regard to these holdings before the Rent Reduction Officer under S. 112A, Bihar Tenancy Act, for the reduction of the rent of the two holdings. This proceeding was instituted by the plaintiffs on the allegation that the rent payable in respect of the holding was cash. The landlords resisted the claim for reduction of rent on the ground that the rent was payable on bhaoli basis. The Rent Reduction

Officer overruled the objection of the landlords and passed an order for the reduction of the rent of both the holdings and the order of the Rent Reduction Officer was upheld by the Collector in appeal. The landlord then went up to the Commissioner in revision and the Commissioner set aside the order of the Collector substantially on the ground that he had no jurisdiction to reduce the rent of a holding for which rent was payable on the bhaoli basis. The order of the Commissioner was upheld by the Board of Revenue. These facts were recited in the plaint and after reciting them the plaintiff claimed relief in the following terms:

"(1) That the holding . . . situated within the zamindari of the defendant which is raiyati occupancy holding of the plaintiff is held on nakdi system and bears a rental of and it be declared that the defendant has no right to realise the rental of the holding in question according to the bhaoli system. (2) That the cost of the suit be decreed in favour of the plaintiff, and (3) That any further or other equitable relief to which the plaintiff might be deemed to be entitled be decreed in his favour."

The Munsif who tried the suit granted a decree in favour of the plaintiffs holding that the plaintiffs had succeeded in establishing that the two holdings were held on cash rent. The decision of the Munsif was, however, reversed on appeal by the Subordinate Judge who held that the holdings in question were not held on a cash rent but on bhaoli basis. The plaintiff has now preferred two second appeals in the title suits. The landlord defendant had instituted two rent suits in respect of the two holdings which were the subject-matter of the title suits claiming recovery of bhaoli rent for certain years. These rent suits were resisted by the tenant-defendants on the ground that no bhaoli rent could be claimed as the holdings were held on a cash rental. The rent suits, however, have been decreed on the same findings as were arrived at in the title suits and now the tenant-defendant in the rent suits who are the same persons as the plaintiffs in the title suit have preferred two second appeals arising out of the rent suits.

The learned Subordinate Judge who was the final Court of fact in all these appeals has, as I have already stated, come to a definite finding that the holdings in question were held not on a cash rental but on a bhaoli basis. This finding being one of fact cannot be re-opened in second appeal. But Mr. Baldeo Sahay, who appears for the appellants in all the four appeals, contends that the finding of the learned Subordinate Judge

(the lower appellate Court) is vitiated by an error of record. It is urged by him that whereas the case of the landlord was that siahās were maintained even for bhaoli lands, the learned Subordinate Judge has proceeded to decide the case on the footing that no siahās were in fact maintained for such lands. It appears, however, on a careful reading of the judgment that there was sufficient material before the Court to enable it to come to the conclusion which is attacked in this Court and, in my opinion, the finding in question cannot be disturbed in second appeal.

A reference to the pleadings and the judgments of the Courts below will show that in the Courts below the appellants did not attack the order of the Commissioner and the Board of Revenue holding that the Rent Reduction Officer had no jurisdiction to reduce the rent of the holdings which are the subject-matter of the present suits. In the plaint of the title suits the appellant does not rely upon the order of the Rent Reduction Officer which had already been vacated by the Commissioner and the Board of Revenue. He merely asked for a declaration to the effect that the holdings in question were held on a nakdi basis. In this Court, however, a new point has been raised. It is contended in the first place that the Commissioner and the Board of Revenue had no jurisdiction to interfere with the order of the Rent Reduction Officer and secondly, that it was necessary for the Rent Reduction Officer while dealing with these cases to decide whether the rent of the holdings in question was payable on cash or bhaoli basis. It is urged that his decision that it was payable on cash basis, whether right or wrong, was final and the civil Court had no jurisdiction to come to an opposite conclusion.

In support of the new point reliance was placed by Mr. Baldeo Sahay on the decision of this Court in 1945 P. W. N. 83.¹ In this case, a Bench of this Court of which I was a member upheld the decision of Rowland J. in a Second Appeal No. 725 of 1942 (1943 P. W. N. 253.²) The facts of that case were briefly as follows: In 1939 certain tenants had applied for reduction of their rent before a Rent Reduction Officer and the rent was subsequently reduced to Rs. 348-6-0. The

landlord preferred an appeal against the order of the Rent Reduction Officer before the Collector, but the appeal was dismissed. The landlord thereupon moved the Commissioner who declined to interfere. The landlord then went up to the Board of Revenue and the Board set aside the order of the Rent Reduction Officer and reduced the rent to Rs. 505. Thereafter the tenants instituted a suit for setting aside the order of the Board of Revenue on the ground that it was without jurisdiction. The suit was decreed and it was held that the Board of Revenue had no power to revise the order of the Rent Reduction Officer inasmuch as S. 112B expressly provided that the order made by the Collector on appeal from an order of the Rent Reduction Officer shall be final. The matter ultimately came up to this Court in second appeal and the decision of the Courts below was upheld by Rowland J., his decision being summarised in the head-note of that case as follows :

"Where under S. 112B, Bihar Tenancy Act, it is provided that the decision of the Collector of the district or of any officer so empowered, or of the prescribed authority, on any such appeal shall be final, there is no power in the Commissioner or the Board to set aside the order of the Collector made rightly or wrongly in the exercise of jurisdiction and even if it is erroneous. It can interfere only if the order is without jurisdiction."

There was afterwards a Letters Patent appeal against the judgment of Rowland J. but his decision was upheld, Agarwala J., who delivered the leading judgment in the appeal observing :

"I would, therefore, hold that the case has been rightly decided by Rowland J. and dismiss the appeal with costs."

I agreed with the judgment of Agarwala J. but I also observed :

"I would have held that the power of superintendence possessed by the Board of Revenue could be used only for administrative purpose and to the limited extent indicated in S. 224 of the Act so far as the High Courts are concerned. In any event I am absolutely certain that it cannot extend beyond the limits suggested in the judgment of Rowland J."

It is contended by Mr. Baldeo Sahay that in view of the judgment of the Letters Patent appeal we must hold that the decision of the Collector in the rent reduction proceeding was final and the Commissioner and the Board of Revenue had no jurisdiction to vacate it. It is also urged that if the orders of the Commissioner and the Board of Revenue are liable to be ignored, then the order of the Collector must be treated as final and inasmuch as that order was based on the view that the holdings were held on a cash rent, the civil Court had no jurisdic-

1. ('45) 32 A. I. R. 1945 Pat. 179 : 24 Pat. 234 : 221 I. C. 223 : 1945 P.W.N. 83, Radha Krishnaji v. Ramkhelawan Singh.

2. ('43) 1943 P. W. N. 253, Radha Krishnaji v. Ramkhelawan Singh.

tion to come to any other finding in this case. On the other hand the learned Advocate-General who appears for the respondents contended firstly, that the order of the Commissioner and the Board of Revenue were not without jurisdiction and that order of the Collector having been vacated, the civil Court had to come to its own finding on the point on which it was invited to give its decision and, secondly, that even if the order of the Collector is assumed to be a good order, it was open to the civil Court to decide that the Collector had acted without jurisdiction in reducing the rent of the two holdings inasmuch as the Rent Reduction Officer had no jurisdiction to reduce the rent of holdings which were not held on a cash rent. For the latter proposition the learned Advocate-General relied on 19 C. W. N. 823,³ 23 C. W. N. 614⁴ and 25 C. W. N. 714.⁵ In 19 C. W. N. 823,³ which was followed in the other cases, the plaintiffs had sued the defendants describing them as under-raiyats and claimed rent at the annual rate of Rs. 30. The defendants resisted the suit on the ground that they were occupancy raiyats and by a commutation order under S. 40, Ben. Ten. Act, they were liable to pay rent only at the rate of Rs. 13 odd. One of the points raised in the High Court was that the order under S. 40 was conclusive between the parties and debarred the plaintiff from contending that the defendants were not occupancy raiyats but under-raiyats. But the learned Judges of the Calcutta High Court disposed of that contention as follows:

"It may be conceded that the propriety of commutation, or of the amount fixed, cannot be called in question in a civil Court. But it is plain that a proceeding under S. 40 is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy raiyat. The Legislature could never have intended that a dispute as to the status of the tenant should be finally decided by the revenue authorities in a commutation proceeding under S. 40 and should thereafter be conclusive between the parties in the civil Court."

Now, I do not suggest for a moment that the second point raised by the learned Advocate General is not a substantial one but I do not propose to discuss it because in my judgment his first point is sufficient to dispose of these appeals. In my opinion, the authority of this Court upon which

Mr. Baldeo Sahay relies does not support him. As has already been stated the view expressed by Rowland J. which was affirmed in appeal was that though the order of the Collector in a rent reduction proceeding cannot be interfered with on merits by the Commissioner or the Board of Revenue, the Board of Revenue can vacate it if the order is without jurisdiction, in the exercise of its power of superintendence. It is true that I was inclined to the view that the power of superintendence was also of a very limited nature, but the decision of Rowland J. which was upheld in Letters Patent appeal was the final decision in the case and upon that decision it cannot be held that the order made by the Board of Revenue in the present case was without jurisdiction. The order of the Board of Revenue in substance was that the Rent Reduction Officer should not have reduced the rent of the present holdings because he had no jurisdiction to reduce the rent of bhaoli holdings. The order of the Collector in the rent reduction proceedings having been vacated by a Court of competent jurisdiction it could not stand in the way of the civil Court coming to its own independent conclusion on the question whether the holdings were held on a cash rental or on bhaoli basis. As I have already stated the appellants themselves had invited the Courts below to come to a finding on that question in order to grant them the reliefs stated in the plaint and they cannot now turn round and say that they had no jurisdiction to come to the finding they have arrived at. As I have already stated the finding of the lower appellate Court is conclusive and in that view these appeals must fail and must be dismissed with costs.

Pande J. — I agree.

G.B./D.H. *Appeals dismissed.*

[Case No. 107.]

A. I. R. (33) 1946 Patna 301

MEREDITH AND RAY JJ.

Inderdeo Prosad Rai — Judgment-debtor — Appellant
v.

Deonarayan Mahton — Decree-holder — Respondent.

Misc. Appeal No. 18 of 1945, Decided on 9th November 1945, from decision of Sub-Judge, 2nd Court, Monghyr, D/- 12th December 1944.

(a) Limitation Act (1908), S. 14 (2) — "Good faith"—Meaning of.

The expression "good faith" in S. 14 (2) itself involves due care and attention, as is clear from

3. ('16) 3 A. I. R. 1916 Cal. 820 : 29 I. C. 896 : 19 C. W. N. 823, Kali Krishna v. Ram Chandra.

4. ('19) 6 A. I. R. 1919 Cal. 264 : 50 I. C. 285 : 23 C. W. N. 614, Shaikh Pokhan v. Rajani Kamal.

5. ('21) 8 A. I. R. 1921 Cal. 530 : 67 I. C. 946 : 25 C. W. N. 714, Mohesh Datta Sukla v. Sheikh Basir.

the definition of "good faith" in S. 2 (7) of the Act. [P 303 C 2]

Limitation Act —

('42) Chitaley, S. 14, N. 20, Pt. 1.

('38) Rustomji, Page 256, Pts. 2, 3.

(b) Limitation Act (1908), S. 14 (2)—Decree-holder's execution application dismissed for default three times — This is not "due diligence."

Where the decree-holder has no less than three times allowed his execution application in a wrong Court to be dismissed for default it cannot be said that he has been showing "due diligence" within the meaning of S. 14 (2). [P 303 C 2]

Limitation Act —

('42) Chitaley, S. 14, N. 11, Pt. 7.

('38) Rustomji, Page 255, N. "Good faith and diligence."

(c) Limitation Act (1908), S. 14 (2) — Only time during which other proceeding was actually being prosecuted can be excluded under S. 14 (2).

The time that can be excluded under S. 14 (2) is merely the time during which the other proceeding is actually being prosecuted with due diligence. [P 303 C 2]

Where the decree-holder files an application for execution in a wrong Court and allows it to be dismissed for default and then files another application almost three years after and has been doing nothing during the long period between the dismissal of the first and the filing of the second execution application he cannot be said during that interval to have been actually prosecuting a proceeding within the meaning of S. 14 (2). No doubt, if the interval has been short and such as has been necessary for taking steps, acquiring information and so on different considerations might arise. [P 303 C 2]

Limitation Act —

('42) Chitaley, S. 14, N. 11,

(d) Civil P. C. (1908), O. 21, R. 5 and S. 39—Decree sent direct to another Court instead of through District Court as required by O. 21, R. 5—Procedure is merely irregular — Transferee Court has jurisdiction to execute decree and is "proper Court" within Art. 182 (5), Limitation Act —Irregularity must be deemed to have been waived if no objection is taken for long time.

A distinction must be made between inherent lack of jurisdiction and the irregular exercise of jurisdiction. The jurisdiction to transfer a case for execution from one Court to another arises not under O. 21, R. 5, but under S. 39, which prescribes the power, and the circumstances in which the transfer may be made. Order 21, R. 5, merely prescribes the procedure, and does not touch the jurisdiction. The transferee Court, if the transfer is made under one of the conditions specified in S. 39, acquires its jurisdiction by the transfer. [P 304 C 1]

Hence, where a decree is sent direct to a Court in another District having the necessary territorial and pecuniary jurisdiction instead of through the District Court as prescribed by O. 21, R. 5, the procedure is merely irregular and the transferee Court has jurisdiction to execute the decree and is a "proper Court" within the meaning of Art. 182 (5), Limitation Act. The case is not one of inherent lack of jurisdiction on the part of the transferee Court but one of irregular assumption of it the irregularity consisting of the non-compliance with

the procedure prescribed by O. 21, R. 5. The irregularity being merely defect in procedure can be waived and must be deemed to have been waived if no objection was taken for a long time : ('43) 30 A. I. R. 1943 Lah. 129 and ('28) 15 A. I. R. 1928 P. C. 162, *Rel. on* ; ('19) 6 A. I. R. 1919 Pat. 324 *held overruled by* ('28) 15 A. I. R. 1928 P. C. 162; *Case law discussed.* [P 304 C 1, 2; P 305 C 2]

C. P. C. —

('44) Chitaley, O. 21, R. 5, N. 1, Pt. 5; S. 21, N. 3, Pt. 1.

('41) Mulla, Page 129, Pt. (q) ; Page 757, Note "Subordinate Court."

Limitation Act —

('42) Chitaley, Art. 182, N. 90.

B. N. Rai and K. K. Sinha — for Appellant.

L. K. Jha and Medni Prasad Singh

— for Respondent.

Meredith J.—This is a judgment-debtor's second appeal arising from an order of reversal, rejecting his contention that the execution of the decree was barred by limitation. The appeal first came before Sinha, J. sitting singly, who has referred it to a Divisional Bench.

The decree in question was made by the Munsif, 2nd Court, Bhagalpur, on 6th September 1932. On 10th May 1933, on the application of the decree-holder the decree was sent to a Munsif's Court, Monghyr, for execution. The provisions of O. 21, Rr. 5 and 8, were not strictly complied with, because the papers were sent direct to the Monghyr Munsif instead of through the District Judge, Monghyr. That defect apparently remained unnoticed for a number of years. On 30th April 1935, an application for execution was filed by the decree-holder in the Court of the Monghyr Munsif. This was dismissed for default on 28th November 1935. The decree-holder did nothing more until 1938, when he filed another application for execution in the Monghyr Court which was dismissed for default in the same year. He then did nothing until the year 1941, when he filed one more application for execution in the Monghyr Court, and this also was dismissed for default in the same year. Another application was then filed on 11th November 1941 also in Monghyr and in the course of argument upon an application under S. 47, in which the point had not been raised, it was urged that the Monghyr Court was incompetent to execute the decree as it was not in proper seisin of the case. On 28th November 1942, the learned Munsif made over the papers to the decree-holder for getting the defect removed, without dismissing the application for execution. He remarked that he saw no justification for dismissing the application and that he could have stayed the case until the necessary formality was

gone through but that was unnecessary, as the decree was not going to be time-barred.

The decree-holder got the irregularity cured, and then filed the present execution case on 1st February 1943. In this case the point was raised that execution was barred, because the previous applications made before the Monghyr Court in the years 1935 to 1941 could not be considered as steps-in-aid made to the proper Court in accordance with law within the meaning of Art. 182 (5), Limitation Act. This objection succeeded before the learned Munsif, but, as I have said, was rejected by the learned Subordinate Judge.

Mr. B. N. Rai for the appellant urges this same point. He bases his argument on two premises. The first is that if the provisions of O. 21, Rr. 5 and 8 are not strictly complied with, the transferee Court has no jurisdiction to entertain the application for execution. In support of this contention, he relies upon two cases, *Bhikhad Bhunjan Narain Tewari v. Upendra Nath Roy* (4 Pat. L. J. 463),¹ a Division Bench case of this Court, and *Debi Dial Sahu v. Moharaj Singh* (22 Cal. 764).² Both these cases support Mr. Rai's proposition.

Mr. Rai's second premise is that where the decree-holder asks the Court to do what it has in fact no power to do that is not a step-in-aid of execution. For this premise Mr. Rai relies on three Patna cases and an Allahabad case. They are: *Amrit Lal v. Murlidhar* (1 Pat. 651),³ *Sital Prosad v. Babu Lal* (11 Pat. 785),⁴ *Mahidar v. Kalyani Prasad* (23 Pat. 707)⁵ and *Ram Raj Dassundhi v. Mt. Umraji* (A. I. R. 1926 ALL. 345).⁶ All these cases lay down that if the decree-holder asks a Court to do what it has no jurisdiction to do that is not a step-in-aid in accordance with Art. 182 (5).

Secondly, Mr. Rai contends that S. 14 (2), Limitation Act, which has been discussed before us, is of no avail to the respondent.

I may say at once that I do not think S. 14, Limitation Act, can help the decree-holder in this case. What S. 14 (2) provides is for exclusion of

"the time during which the applicant has been prosecuting with due diligence another civil proceeding, etc., etc., in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

The expression "good faith" in this connection itself involves due care and attention, as appears from the definition of "good faith" in S. 2 (7), Limitation Act. It is difficult to hold that where the decree-holder, as in the present case, has no less than three times allowed his application to be dismissed for default he has been showing due diligence. Apart from that I think, though I have not been able to find any ruling directly upon the point, that the time that can be excluded under S. 14 is merely the time during which the other proceeding is actually *being prosecuted* with due diligence. In the present case, there are long gaps of almost three years on two occasions between one application and another. The decree-holder was apparently doing nothing during those long periods. He cannot be said, in my opinion, during such intervals to have been actually prosecuting a proceeding within the meaning of S. 14. No doubt, if the delay had been short, and such as had been necessary for taking steps, acquiring information and so on, different considerations might arise, but I am not prepared to hold that long periods of idleness could ever have been meant to be excluded by the provisions of S. 14. Now, the two applications which were in order were applications of 10th May 1933 for transfer, and of 1st February 1943, for execution. There is an interval of nearly ten years. Even if the maximum possible period be deducted on account of the pendency of the various execution cases in the interval, the balance left will still be much more than the three years specified in Art. 182 (5) as the maximum between one application and the next. Therefore, S. 14 is not material in the present case.

Upon the other point I find myself unable to accept Mr. Rai's contention, despite the apparent weight of authority in support of it. Mr. L. K. Jha for the respondent has relied mainly upon *Bhagwan Singh v. Barkat Ram* (A.I.R. 1943 Lah. 129).⁷ In that case Tek Chand J. has exhaustively considered the whole position with regard to the jurisdiction of the transferee Court where the transfer has not been made strictly in accordance with O. 21, R. 5. I am in complete agreement with his discussion of the subject, and feel I cannot improve upon his

1. ('19) 6 A.I.R. 1919 Pat. 207 : 4 Pat. L. J. 463 : 51 I. C. 801.

2. ('95) 22 Cal. 764.

3. ('22) 9 A. I. R. 1922 Pat. 188 : 1 Pat. 651 : 67 I. C. 538.

4. ('32) 19 A. I. R. 1932 Pat. 309 : 11 Pat. 785 : 142 I. C. 155.

5. ('45) 32 A. I. R. 1945 Pat. 71 : 23 Pat. 707 : 219 I. C. 491.

6. ('26) 13 A.I.R. 1926 All. 345 : 93 I. C. 292.

7. ('43) 30 A. I. R. 1943 Lah. 129 : 207 I. C. 561.

reasoning. He has pointed out that a distinction must be made between inherent lack of jurisdiction and the irregular exercise of jurisdiction. The jurisdiction to transfer a case for execution from one Court to another arises not under O. 21, R. 5, but under S. 39, Civil P. C. Section 39 prescribes the power, and the circumstances in which the transfer may be made. Order 21, Rr. 5 and 8 merely prescribe the procedure by which the transfer is to be carried out. This fact is in no way altered by the provision in S. 121, Civil P. C., that the rules shall have effect as if enacted in the body of the Code. No matter where it stood, O. 21, R. 5 would still be merely a rule prescribing a particular mode of procedure, as indeed the side note to the rule indicates.

If O. 21, R. 5 merely prescribes the procedure, it does not touch the jurisdiction. The transferee Court, if the transfer is made under one of the conditions specified in S. 39, acquires its jurisdiction by the transfer. We may assume that it has already the necessary territorial and pecuniary jurisdiction. Once, therefore, the decree has been sent and received, the transferee Court has obtained jurisdiction, and we are dealing with a mere irregularity.

Mr. Rai relies upon the fact that under Art. 182 (5) the Court must not only have jurisdiction, but must also be the proper Court, and the application must be in accordance with law. "Proper Court" is defined in the explanation to Art. 182 as the Court whose duty it is to execute the decree.

This, in my opinion, does not help the appellant. Once the application for sending the decree is made, it is for the Court to see that it is done through the proper channel. The decree-holder need not concern himself with the channel. It seems certain that all he knew was that he had applied for a transfer of the Court and it had been made, and the Monghyr Court had received the case. His application was, therefore, made in Monghyr to the proper Court as far as he was concerned. The Bhagalpur Court having transferred the decree could no longer entertain an application for execution. The Monghyr Court had jurisdiction, and consequently it was its duty to execute the decree once it had received it on transfer, and it is not alleged that, except for the fact that it was made to the Monghyr Court, the application was not otherwise strictly in accordance with law.

In the decision I have just been considering it was also pointed out on the authority

of the Privy Council that a mere defect in procedure may be waived, and in certain circumstances waiver may be presumed. The case in question is *Jang Bahadur v. Bank of Upper India, Ltd.* (55 I. A. 227).⁸ In that case the application under S. 50, Civil P. C., which should have been made to the Court which passed the decree, was in fact made to the Court executing it. This Court was allowed to proceed without objection until the last moment when the property was being actually put up for sale. Their Lordships proceeded to make the distinction between inherent lack of jurisdiction and defect in the exercise of jurisdiction. They held that the provisions of S. 50 were merely matters of procedure. Before execution can proceed against the legal representative of a deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. "This," they say, "is a matter of procedure, and not jurisdiction. Jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure, the defect might be waived and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings."

After considering all the circumstances, their Lordships came to the conclusion that the transferee Court (Hardoi Court) had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, was submitted to for a considerable time by him. He could not then be heard to object to the exercise of such jurisdiction, and it would be to permit a gross abuse of procedure if he was allowed to do so.

If S. 50 is a matter of procedure, it is apparent that O. 21, R. 5 is for even stronger reasons merely a matter of procedure. The channel through which a transfer is made is more obviously a mere matter of procedure than the question of which Court should entertain the application under S. 50.

The cases relied upon by Mr. Rai for the proposition that an application to a Court to do something which it cannot do is not a step-in-aid of execution; *Sital Prasad v. Babu Lal* (11 Pat. 785)⁴ and *Amrit Lal v. Murlidhar* (1 Pat. 651)¹ were both cases of transfer to a Court not having the necessary pecuniary jurisdiction. These were, therefore, clearly cases of complete lack of juris-

8. (28) 15 A. I. R. 1928 P.C. 162 : 3 Luck. 314 : 55 I. A. 227 : 109 I. C. 417 (P. C.).

diction, not of irregularity. *Mahidar v. Kalyani Prasad* (23 Pat. 707)⁵ was a case where the Court was asked to proceed against property lying outside its jurisdiction, and here again there was a lack of jurisdiction. A similar distinction can be made with regard to *Ramraj Dassundhi v. Mt. Umraji* (A. I. R. 1926. ALL. 345).⁶

It remains to deal with the two cases in which it was held that in these circumstances there is no jurisdiction in the transferee Court. I have given the reasons why, following *Sardar Bhagwan Singh v. Lala Barkat Ram* (A.I.R. 1943 Lah. 129),⁷ I consider these decisions wrong. *Debi Dial Sahu v. Moharaj Singh* (I.L.R. 22 Cal. 764)² need not trouble us. A Calcutta decision is not binding upon us. *Kunja Behari Singh v. Tarapada Mitra* (4 Pat. L. J. 49)⁹ is, however, a decision of this Court and ordinarily we would be bound to follow it, or refer the matter to a Full Bench. There is, however, no discussion at all of the point at issue in this case. It appears the word "jurisdiction" was used in the wider sense, without considering the distinction between complete absence of jurisdiction and irregular exercise of jurisdiction. This case was decided in 1918, long before the decision in *Jang Bahadur v. Bank of Upper India, Ltd.* (55 I. A. 227)⁸ which was in 1928. In so far as the distinction just referred to has not been made, I think that *Kunja Behari Singh v. Tarapada Mitra* (4 Pat. L. J. 49)⁹ must be considered to have been overruled by this Privy Council decision, upon which the reasoning in *Sardar Bhagwan Singh v. Lala Barkat Ram* (A. I. R. 1943 Lah. 129)⁷ is largely founded.

Mr. Jha for the respondent has further urged that the question now raised is barred by *res judicata*. I do not think, however, that the question of limitation was actually raised and definitely decided by the learned Munsif in his order of 28th November 1942. He made a mere casual observation that he did not consider it necessary to stay the proceedings because the decree was not going to be barred. There is no question of *res judicata*, in my judgment, but upon the other ground the appeal must, in my opinion, fail. It is true that there is nothing definitely to show that the appellant ever received any notice of the applications of 1935, 1938 and 1941, but it is highly probable that he must have done, and apart from the question of waiver, which is more strictly

relevant regarding what should have been done by the Munsif in 1942, the fact remains that these applications for execution were in accordance with law and must be held to have been made to the proper Court in the circumstances. They, therefore, came within Art. 182 (5) and saved limitation.

I would dismiss the appeal with costs.

Ray J. — I entirely agree and for the same reasons. I wish to add a few words to what my learned brother has said. One of the premises of Mr. B. N. Rai's argument was that it is the District Judge who alone would confer jurisdiction on the transferee Court. He, therefore, contends that sending through the District Court is a matter of substance, and not of mere form. He does not, in fact, challenge the validity of the order transferring the decree for execution, nor does he challenge the competence of the Monghyr Court to which the decree was transferred. On the other hand, he concedes that the transferee is one of the competent Courts within the meaning of s. 39, Civil P. C. The pith and substance of his argument, therefore, is that there was lack of jurisdiction because the District Judge, who alone could confer jurisdiction upon any of his subordinate Courts to execute the decree transferred from another district, had not conferred that jurisdiction. In my view, he is completely wrong in this contention of his. The subordinate Courts, such as, Munsifs and Subordinate Judges, do not derive their jurisdiction, either pecuniary or territorial, primarily from orders of the District Court. The subject of constitution of civil Courts and their jurisdiction is dealt with in Bengal, Agra and Assam Civil Courts Act, 1887. Section 9 of the Act lays down :

"Subject to the superintendence of the High Court, the District Judge shall have administrative control over all the civil Courts under this Act within the local limits of his jurisdiction."

Section 13 (1) provides :

"The Local Government may, by notification in the Official Gazette, fix and alter the local limits of the jurisdiction of any civil Court under this Act,"

and sub.s. (2) of the section empowers the District Judge to make an assignment of civil business by way of apportioning the work as between several Munsifs or several Subordinate Judges, as the case may be, appointed by the Provincial Government, with the same local jurisdiction assigned to them. That the assignment of civil business arising from a local area to a particular Munsif or Subordinate Judge does not con-

9. (19) 6 A.I.R. 1919 Pat. 324 : 4 Pat. L. J. 49 : 49 I. C. 374.

fer any jurisdiction, will be apparent from the provisions of sub-s. (3) where it is laid down that a decree or order passed by a Munsif or Subordinate Judge shall not be invalid for the reason only of the case having arisen in a place beyond a local area assigned to him under sub-s. (2). Their pecuniary jurisdiction, so far as it goes, is provided for in Chap. 3 of the Act. So the subordinate civil Courts in the district derive their jurisdiction, either pecuniary or territorial, from the statute.

The District Judge, as is apparent, has simply an administrative control over them. His power of transferring appeals and other special proceedings to Subordinate Judge or Munsifs, as the case may be, is derived from ss. 22, 23, etc., of the Act. The premises, aforesaid, make it clear that this mode of transfer, through the District Court, is a matter of form and ceremony, of course, not without a purpose, which presumably, is that in the event of its being necessary to execute the decree in any other subordinate Court of the District, which event may arise under multifarious contingencies, it will no longer be necessary to approach the Court that passed the decree for a fresh transfer. The purpose rather is to vest the District Court with power to execute and the power to transfer from one Court to another in his district as the exigencies of the matter may require.

It is not the decision that we have arrived at on the question at issue, but the decision of this Court in the case of *Kunja Behari Singh v. Tarapada Mitral* (4 Pat. L.J. 49⁹) that gave me the most concern at the hearing; but after consideration I am convinced that the word "jurisdiction" was rather loosely used in that decision. The nature of the objection that was taken, as was taken in the case before us, is in its nature the same as an objection to place of suing a matter amply provided for in ss. 15 to 21, Civil P. C. In sections just referred to, the word "jurisdiction" is also used but with no such efficacy in relation to validity of proceedings as it would otherwise be where there will appear inherent lack of jurisdiction (*vide* S. 21).

G.N./D.H. *Appeal dismissed.*

[Case No. 108.]

A. I. R. (33) 1946 Patna 306

MANOHAR LALL AND DAS JJ.

Sm. Jamuna Devi — Appellant

v.

Mangal Das and others — Respondents.

Appeal No. 37 of 1945, Decided on 11th October 1945.

(a) Hindu law—Joint family property—Property sold in court auction — Subsequent final decree for partition — Property allotted to mother—Prior title by auction sale is not defeated — Mother has no inchoate or quasi-contingent right before actual partition.

Where a joint family property, which is liable to be sold in execution of a money decree binding on all the members of the joint family, passes into the hands of an auction-purchaser before the mother acquires her exclusive right in it by virtue of a final decree passed in a partition suit brought by the son against his father to which the mother is made a party, the subsequent allotment of the property to the mother in the final decree would not defeat the prior title which has vested in the auction-purchaser by the previous auction sale. The crucial date for consideration is the date when the property has passed to the stranger auction-purchaser. The mother cannot be said to have an inchoate or quasi-contingent right in the property which ripens into an absolute right if and when the partition actually takes place: ('36) 23 A.I.R. 1936 P. C. 20 and ('18) 5 A. I. R. 1918 Bom. 175, *Foll.*; 33 All. 118 and 9 W.R. 61, *Ref.*; 27 Cal. 77, *Dissent.* [P 308 C 1, 2]

(b) Civil P. C. (1908), S. 64 — Attachment — Effect of.

Where a property is attached, no alienation after the date of attachment, whether voluntary or involuntary, will affect the auction-purchaser who later on purchases the property. [P 308 C 2]

C. P. C.—

('44) Chitaley, S. 64, N. 5.

(c) Hindu law—Partition—Mother's right — Property vests in mother from date of final decree for partition.

Before the assignment is actually made no title passes to the mother as she is not the owner of any share in the joint family property. Where, therefore, an assignment is actually made by virtue of a final decree for partition, it cannot be held that in the eye of law the property vested in the mother not from the date of the final decree but from the date of the preliminary decree entitling her to a share: 9 W.R. 61, *Foll.* [P 308 C 2; P 309 C 1]

(d) Civil P. C. (1908), S. 65 — Auction-purchaser — Title vests from actual date of sale and not of confirmation.

Under S. 65, title vests in the auction-purchaser not from the date when the sale is confirmed but on and from the date when the sale is actually made, provided the sale is subsequently confirmed. [P 309 C 1]

C. P. C.—

('44) Chitaley, S. 65 N. 8, Pt. 2.

('41) Mulla, Page 265, Pt. (b).

(e) Transfer of Property Act (1882), S. 52 — Partition suit — Sale of property pending suit in execution of decree for pre-partition debt binding on whole family—Property allotted to mother under partition decree—No provision made in decree as to above debt — Execution sale not affected by *lis pendens*.

It is well settled that a partition suit operates as *lis pendens* with the result that the purchaser of an undivided share pending a suit takes only that property which is allotted on partition to his vendor. But a partition suit does not operate as *lis pendens* where a property subsequently allotted to the mother under a final decree for partition has been sold pending the partition suit in execution of a

decree in respect of a pre-partition debt binding on all the members of the family and no provision is made in the partition decree for the payment of that debt, because the decree-holder is entitled to proceed against the entire joint family property which, on the date on which he proceeds to sell it, is not vested in the mother to any extent : 27 Cal. 77, *Rel. on.* [P 309 C 1, 2]

T. P. Act —

(145) Chitaley, S. 52, N. 19.

(136) Mulla, Page 231, Note "Suit for partition."

Rai I. B. Saran and Harihar Prasad Sinha
— for Appellant.

L. K. Jha and Phulan Prasad Varma —

for Respondents.

Manohar Lall J.—In this appeal by the plaintiff an interesting question of Hindu law arises for consideration. The facts are these. On 7th October 1922 defendants 4 to 6 gave a rehan of the disputed property to the joint family consisting of defendant 2, Naunit Lal, the father, and defendant 3, Lachmi Narain, the son. Defendant 1, Mangal Das, advanced certain sum to defendant 2 on the basis of a handnote dated 17th February 1937 and obtained a decree on the basis thereof on 13th May 1940. In execution of that decree which was started on 11th December 1940 he attached the disputed house on 11th March 1941 and became the auction-purchaser on 19th May 1941. The sale was confirmed on 19th November of that year.

On 15th April 1940 the son had instituted a suit for partition against the father in which he made the plaintiff, the wife of defendant 2, a party, because the parties being governed by Mitakshara School of Hindu law, the mother was entitled to a share on partition being actually effected. The preliminary decree was passed on 6th December 1940 and the Commissioner submitted his report as to the allocation of the properties of the joint family on 12th May 1941 and the final decree in the partition suit was made either in June or July 1941. Upon these allegations the plaintiff, Jamuna Devi, wife of Naunit Lal, instituted a suit on 29th November 1941 for a declaration that defendant 1 had no right to attach and sell the disputed property which was in the exclusive possession and occupation of the plaintiff from before the attachment in the money decree of defendant 1 as the result of a partition, and that the sale of 19th May 1941, was wholly ineffective against the plaintiff it should be stated here that defendant 1 in execution of his decree purchased the mortgagee's rights which were vested in the joint family. The trial Court did not accept the contention of defendant 1, who was the only contesting defendant, that the partition

suit and the proceedings therein were collusive and fraudulent. The effect of the allotment of the house to the plaintiff in the partition decree was thus summed up by the learned Munsif :

"Until the passing of the final decree, no right of enjoyment of ownership in the property in dispute accrued to the plaintiff. I have already stated above that the auction sale was prior to the passing of the final decree and therefore at a time when the right of separate enjoyment of property in dispute accrued to the plaintiff, the property had already passed on to the defendant and it ceased to be a part and parcel of the joint family property which could form the subject of the partition."

He believed the case of the defendant that he was in possession of the property in dispute and that the plaintiff had not been in possession as was alleged by her. The lawyer of the defendant had urged before the trial Court that as the debt was a pre-partition debt, the plaintiff was liable for it, but the learned Munsif refused to extend the doctrine of pious obligation to the wife, although he gave the finding that the particular debt on the basis of the hand-note could not be said to be tainted with immorality or illegality. Accordingly he dismissed the plaintiff's suit. In appeal the learned Subordinate Judge came to the same conclusion. He points out that in the plaint the validity of the decree obtained by defendant 1 in the money suit against defendant 2 was challenged on the two grounds that it was collusive and that the debt on the hand-note was contracted for immoral purposes. On both these questions of fact the learned Subordinate Judge agreed with the trial Court so that it must be held that the loan, for the recovery of which the money suit was filed, was taken by defendant 2 as the managing member of the family, and that the decree which was obtained in the money suit was binding on all the members of the joint family, and, therefore, the disputed property which formed a part and parcel of the joint family property was liable to be sold in execution of that decree.

The learned Judge further pointed out that although this was a pre-partition debt, no provision was made for the payment of this debt in the partition decree. In this view he accepted the argument advanced on behalf of the defendant that the defendant first party was entitled to proceed against the disputed property for the realisation of his decretal dues even though the house has been allotted to the patti of the plaintiff. The learned Judge relied upon the case in A. I. R. 1931 ALL. 512,¹

1. (31) 18 A. I. R. 1931 All. 512 : 53 All. 868 : 135 I. C. 139 (F.B.), Bankey Lal v. Durga Prasad.

which lays down that when a simple money debt binding on the entire family remains unpaid, and the members of the family enter into a partition without making any provision for the payment of the family debt, the creditor may enforce the payment of his debt by proceeding against the properties received by partition by the several members of the family. The learned Judge goes on that in the present case the disputed property passed into the hands of the defendant first party by a court sale before the plaintiff acquired her exclusive right in it by virtue of the final decree passed in the partition suit, and, therefore, the subsequent allotment to the plaintiff would not defeat the prior title which had vested in defendant 1 by his previous auction sale. The learned Subordinate Judge refers to the decision of the Bombay High Court in 42 Bom. 535,² in support of the view taken by the learned Munsif and observes :

"In this Bombay case one B died leaving a widow Y, a son R, and a grandson A. A brought a suit for partition and possession of his one-half share in B's estate joining Y and B as defendants. A preliminary decree was passed holding that Y was entitled to one-third share, but Y died before any final decree could be passed. It was held that until the actual partition was effected no share in B's estate passed to the ownership of Y and therefore the share assigned to her remained an integral part of the estate available for division among the heirs of her husband."

In the conclusion the learned Subordinate Judge dismissed the appeal. Hence the second appeal to this Court. The learned advocate on behalf of the appellant was not in a position to challenge the correctness of the view adopted by the Courts below where they placed reliance upon the principle of 42 Bom. 535,² which followed the decision of the Allahabad High Court in 33 ALL. 118.³ These two decisions were approved by the Judicial Committee as correctly representing the Mitakshara law on the matter now under consideration in 63 I. A. 33.⁴ The learned advocate, however, sought to distinguish this decision of their Lordships which expressly approved of the case in 9 W. R. 61,⁵ decided by Mitter J. in 1868 by urging that in the case before their Lordships no actual division of the joint family property had been made at the relevant date and, therefore, *Dhanbati*

did not become the owner of the share then in dispute. I am unable to agree that any such distinction can be made, although the argument of the learned advocate is to some extent supported by the decision of the Calcutta High Court in 27 Cal. 77.⁶ In that case the learned Chief Justice and Banerji J. held that the mother had an inchoate or quasi-contingent right which ripened into an absolute right if and when the partition actually took place. A perusal of the judgment of the Division Bench shows that they were not inclined to approve of the decision given by Mitter J. in 9 W. R. 61,⁵ but as their Lordships of the Judicial Committee in 63 I. A. 33,⁴ have now expressly accepted the correctness of that decision, the observations in 27 Cal. 77⁶ have lost their weight. Moreover at p. 82 the learned Chief Justice himself states :

"If there existed in the mother any such ownership, must not a purchaser from a son of his share—I am not speaking of a sale for the payment of the father's debts—purchase subject to that right?"

In the present case the sale to defendant 1 was a sale for the payment of the debts validly binding on the joint family. But there is a further answer to the contention raised by the appellant. In 63 I. A. 33⁴ their Lordships observed at p. 45 that "*Dhanbati* at that time was not the owner of any share in the joint property and had no right of redemption." It is clear, therefore, that the crucial date for consideration is the date when the property has passed to the stranger auction-purchaser. It is obvious, and indeed it is conceded, that on 19th May 1941 the right in the disputed property had passed out to defendant 1 and Jamuna Devi was not the owner on that date of any share in the joint property. If this critical date is kept in view, the distinction sought to be drawn disappears. The house was attached on 11th March 1941 and no alienation after that date, whether voluntary or involuntary, will affect the auction-purchaser if he later on purchases that house. But it was argued that as there has been a final allotment in this case, even though it was in June or July 1941 it should be held that in the eye of law the title in this house vested in the mother not from the date when the final decree was passed but on 6th December 1940 when the preliminary decree was passed entitling her to a share. Now this is the same argument over again and is negatived by the weighty observations of Mitter J. which have been

2. ('18) 5 A. I. R. 1918 Bom. 175 : 42 Bom. 535 : 46 I. C. 750, *Raoji Bhikaji v. Anant Laxman*.

3. ('11) 33 All. 118 : 7 I. C. 908, *Beti Kunwar v. Janki Kunwar*.

4. ('36) 23 A. I. R. 1936 P. C. 20 : 63 Cal. 691 : 63 I. A. 33 : 159 I. C. 1080 (P.C.), *Pratap Mull v. Dhanbati Bibi*.

5. ('68) 9 W. R. 61, *Sheo Dyal Tewaree v. Judoo Nath*.

6. (1900) 27 Cal. 77, *Jogendra Chunder Ghose v. Ful Kumari Dassi*.

cited with approval by their Lordships at page 44:

"Suppose that Gulaba instead of appearing as an intervenor in the lower Court, as she did, under S. 73 of the Procedure Code had brought an action against them both for the arrears of her maintenance which would have accrued subsequent to the decree of the lower Court down to the present date. What answer could they have given to such a claim? Surely they could not have pleaded she was not entitled to be maintained out of the estate, because they were *going to make over to her* a share of it. Such a plea would be absurd on the very face of it. She is not to starve until the assignment is *actually made*."

The words underlined (here italicized) in this quotation were shown in italics in the Privy Council judgment of their Lordships. The argument of the learned advocate merely amounts to urging that on 6th December 1940 it had been agreed either voluntarily or as a result of the decision in the partition suit that the son and the father were "going to make over" to Jamuna Devi a share in the joint family property. But it is authoritatively held now that before the assignment is actually made no title passes to her as she is not the owner of any share in the joint family property. Now, when was the assignment actually made in the present case? Obviously, on or after June or July 1941. It was also sought to be argued that the sale was confirmed on 19th November 1941 after the date of the final decree in the partition suit, and, therefore, no title passed to defendant 1. But the short answer to this contention is that under S. 65, Civil P. C., title vests in the auction-purchaser not from the date when the sale is confirmed but on and from the date when the sale is actually made, namely 19th May 1941 in the present case, provided the sale is subsequently confirmed. For these reasons I must overrule this contention and I am in agreement with the views taken by the Courts below.

It was then argued that the transfer in favour of defendant 1 as a result of the involuntary sale is hit by the rule of *lis pendens* enunciated under S. 52, T. P. Act, and reliance was placed for this upon the case in 27 Cal. 77,⁶ noticed above. It is true that this aspect of the matter has not been dealt with by their Lordships of the Judicial Committee in 63 I. A. 33⁴ but in my view the provisions of S. 52, T. P. Act, are of no avail to the appellant. It may be assumed as well settled now that a partition suit operates as *lis pendens* with the result that the purchaser of an undivided share pending a suit takes only that property which is allotted on partition to his vendor—the contrary view which

prevailed at one time in the Calcutta High Court is not correct. But in the present case it has been found by the Courts below that the dues of defendant 1 were a prepartition debt, and no provision had been made in the partition decree for the payment of that debt, and, therefore, defendant 1 was entitled to proceed against the entire joint family property which, on the date on which he proceeded to sell it, was not vested in the plaintiff to any extent. Defendant 1 has not been found in the present case to have been aware of the institution of the partition suit—indeed the argument under the Transfer of Property Act was not advanced in either of the Courts below—and it is impossible to conceive in these circumstances as to how defendant 1 in execution of his decree which he obtained on 13th May 1940 could have joined the mother as a defendant either in the main suit or in the execution proceedings. It may also be added that in this case the right of the joint family in the house in question is merely that of a mortgagee's right to retain possession so long as the mortgagors, defendants 4 to 6, did not choose to be redeemed. It is doubtful if in such a case even the principle enunciated in 27 Cal. 77⁶ will have any application. But it is unnecessary to decide this point. A later decision of the Calcutta High Court in 57 Cal. 597,⁷ confirms me in my view. I would, therefore, overrule the second contention also. The result is that I would dismiss this appeal with costs.

Das J. — I agree.

V.R.

Appeal dismissed.

7. ('29) 16 A. I. R. 1929 Cal. 697 : 57 Cal. 597 : 126 I. C. 408, Baldeodas v. Sarojini Dasi.

[Case No. 109.]

A. I. R. (33) 1946 Patna 309

FAZL ALI C. J. AND AGARWALA J.

Parbati Charan Das and others —

Appellants

v.

Jagdamba Prasad Sinha and others —

Respondents.

Letters Patent Appeal No. 10 of 1944, Decided on 3rd January 1946, from decision of Manohar Lal J., D/- 14th February 1944.

Civil P. C. (1908), S. 60—Objection not taken at time of sale — Title of auction-purchaser not affected.

Certain lands on which the defendant had built houses were sold in execution of a money decree against the defendant and purchased by the plaintiff. The defendant was an agriculturist but did not raise any objection to the execution sale of the house sites. The plaintiff then got delivery of

possession of the plots. Subsequently, the plaintiff sought to sell the buildings in execution for the balance remaining due under his decree. The defendant raised the objection that they were not liable to sale as he was an agriculturist. This objection was upheld and the houses were declared exempt from sale. Thereupon, the plaintiff brought a suit for possession of the sites and prayed that the defendant be ousted therefrom and the buildings removed. The claim was decreed:

Held that the defendant was precluded from objecting to the sale of the house sites as he had not raised the objection at the time of their sale; that the plaintiff's title to the sites was not open to dispute and that the order passed was correct.

[P 310 C 1,2]

C. P. C. —

(44) Chitaley, S. 60 Notes 23 and 24.

R. S. Chatterji — for Appellants.

S. C. Mazumdar and Gokulanand Prasad —
for Respondents.

Fazl Ali C. J.—This is a Letters Patent appeal against the decision of Manohar Lall J., in a second appeal arising out of a suit instituted by the plaintiff-respondents to recover possession of portions of plots Nos. 554, 556 and 553 which are situated in Mauzah Sisia Sheo Prasad. The suit was dismissed by the first two Courts but was decreed on second appeal. The defendants have now preferred this appeal under the Letters Patent. The defendants were admittedly the owners of a 5 annas 4 pies share in the village. This share was purchased in execution of a money decree by the plaintiffs who are cosharers in the village to the extent of 10 annas 8 pies. The share of the defendants was sold some time in 1932 and in 1933 and 1934 the respondents got delivery of possession of the different portions of the disputed land. It appears that the appellants had built certain houses upon this land and so in 1938, the decree still remaining unsatisfied, the respondents applied for the sale of the houses which stood upon the disputed land. The appellants thereupon preferred an objection claiming that the houses could not be sold as they were agriculturists and their main source of livelihood was agriculture. The claim was upheld and the houses were exempted from sale. Thereafter the respondents brought the present suit claiming possession of the disputed land and prayed that the defendants be ousted therefrom and the structures thereon be removed. This claim has been decreed by the learned single Judge.

It has been found by all the Courts that in 1932 the land which formed the site of the houses belonging to the appellants was sold. It was open to the appellants to object to the sale of the sites of the houses on the ground of their being agriculturists but they

did not do so and the sites were sold. It is contended in this Court for the first time that the sites were not sold, but Manohar Lall J., states in his judgment that the sale certificate clearly shows that the sites were sold. Such was also the finding of the first two Courts and there can be no doubt about the correctness of that finding because in the memorandum of appeal filed in this Court it is not asserted that the sites were not sold, but the judgment of the learned single Judge is attacked on the assumption that the sites had been sold. The learned single Judge has rightly pointed out that in the claim case which was instituted by the appellants in 1938 there was only a direction that the building could not be sold and there was no dispute as to the title to the sites of the building which had already passed to the respondents. Upon that view it seems clear that the respondents are entitled to recover possession of the sites and the order of the learned single Judge directing that the houses be demolished and the materials be removed by the appellants at their own costs was the only order which could be passed under the circumstances of the case. It was contended that the present suit is barred by limitation and by the principle of *res judicata*. This contention, however, was based upon the assumption that the land upon which the houses stand was not sold in the first instance. But as I have already stated that assumption cannot be justified in fact. The result is that the appeal must be dismissed, but I would make no order as to costs in this Court.

Agarwala J. — I agree.

N.S./D.H.

Appeal dismissed.

[Case No. 110.]

A. I. R. (33) 1946 Patna 310

MEREDITH AND RAY JJ.

Mt. Surajbansi Kuer and others —

Defendants — Appellants

v.

Mt. Larho Kuar — Plaintiff —
Respondent.

Appeal No. 851 of 1944, Decided on 27th November 1945, from appellate decree of Sub-Judge, Muzaffarpur, D/- 27th April 1944.

(a) Bihar Money-lenders (Regulation of Transactions) Act (7 [VII] of 1939), S. 4 — Applicability of — Section applies to professional money-lenders and not to isolated or intermittent instances of lending.

Section 4 is intended to apply to those persons who are money-lenders by profession, or, in other words, who carry on, or desire to do, the business of money-lending. It is apparent on the face of S. 4

of the Act of 1939 and S. 5 of the Act of 1938, which cannot be dissociated, that they were never intended to apply to cases of isolated or intermittent instances of lending nor to similar other transactions which technically may come within the definition of "loan" and may make the beneficiaries under the transactions come within the definition of "money-lending" for general purposes of the Act. The Legislature never intended that a casual money-lending transaction entered under unforeseen circumstances should be incapable of being enforced through Court, unless the claimant happens to be a registered money-lender.

[P 312 C 1, 2; P 313 C 1]

The plaintiff, in the course of her business as a timber merchant, supplied some timber to the defendants, and for the purpose of ensuring payment of price of the timber accepted a handnote in lieu thereof. The money due under the handnote was not paid, and, therefore, another handnote was executed by way of renewal on a date subsequent to the passing of the Bihar Money-lenders Act. In a suit to recover the sum due on the latter handnote:

Held that the transaction evidenced by either of the handnotes was not a 'loan' within the meaning of S. 4 and the plaintiff was not a 'money-lender' for the purposes of that section.

[P 311 C 1, 2]

(b) Interpretation of statutes — Definition—Meaning assigned by definition is "artificial meaning."

Whenever any meaning either wider or more limited than its natural connotation is sought to be assigned to an expression occurring in a statute, it has to be defined. Such a meaning is known as "artificial meaning." The Legislature has, therefore, to be cautious to retain its plain grammatical meaning, when placed in a particular context, its artificial meaning will produce repugnancy.

[P 312 C 2]

(c) Bihar Money-lenders (Regulation of Transactions) Act (7 [VII] of 1939), Ss. 2 (f) and 4—S. 4 applies only to loans advanced after commencement of Act.

Section 4 can only be meant to apply to loans advanced after the commencement of the Act. The section as worded does not bar a Court from entertaining suits by unregistered money-lenders for the recovery of all loans but only such loans as may have been advanced after the commencement of the Act. Under the definition in S. 2 (f) "loan" may, no doubt, include a transaction on a bond bearing interest executed in respect of past liability, but the use of the word "advanced" in S. 4, introduces repugnancy of context, and so limits the application of the word "loan."

[P 313 C 2]

B. N. Rai and Kailash Ray—for Appellants.

G. C. Mukherji—for Respondent.

Ray J.—This appeal arises out of a suit for recovery of Rs. 1132-12-7, including principal and interest. The plaintiff according to her allegation in the plaint is a timber merchant, and this allegation is not denied in the written statement. In course of her business, as a timber merchant, she had supplied some timber to the defendants, and for the purpose of ensuring payment of price of the timber she accepted a hand-note for a sum of Rs. 651 in lieu thereof on 1st June

1928. This hand-note is Ex. 1. The money due under the hand-note was not paid, and, therefore, in course of time, on 25th May 1941, another hand-note (Ex. 2) was executed, by way of renewal, for a sum of Rs. 885 as principal, and that sum included the original liability of Rs. 651 plus interest that accrued due till that date. This hand-note (Ex. 2) also carried interest, according to the stipulation, at the rate of Re. 1 per cent. per mensem. The present suit is for recovery of the sum aforesaid due in terms of Ex. 2.

The defendants raised various pleas in their written defences, but at the trial they stuck to one only of them, namely, the plea in bar of the suit under the provisions of S. 4, Bihar Money-lenders Act, 1939. The learned Munsif who tried the suit came to the conclusion that non-compliance with the provisions of S. 4, Bihar Money-lenders Act, was a bar to the plaintiff's suit, and, therefore, he dismissed it so far as the suit embraced the relief for recovery of the sum due under the hand-note aforesaid, but decreed the claim for another sum of Rs. 134 odd which had also been included in the same suit, being the arrears of price of further supply of timber to the defendants. The plaintiff went up in appeal, and the defendants too filed a cross-appeal. The appellate Court, however, took a different view, and found that S. 4, Bihar Money-lenders Act, did not apply to the case. He, therefore, decreed the plaintiff's suit, and dismissed the defendants' cross-appeal as against the decree for recovery of Rs. 134 odd as it was not pressed.

The defendants are appellants in this second appeal, and this appeal is confined to the plaintiff's relief for recovery of Rs. 1132 odd under the hand-note (Ex. 2), and here too the only contention raised is one based upon S. 4, Bihar Money-lenders Act. Mr. B. N. Rai, who appears for the appellants, contends that the transaction evidenced by Ex. 2 is a loan within the meaning of S. 2, cl. (f), and the plaintiff is a money-lender within the meaning of S. 2, cl. (g), and that, therefore, the transaction in suit is one which should be governed in all its different aspects by the provisions of the Bihar Money-lenders Act. He invites our attention to an Ordinance called the Provincial Debt Laws (Temporary Validation) Ordinance 11 [XI] of 1945, which validates all provincial legislations, including the Bihar Money-lenders Act, applicable to loan transactions based upon hand-notes which had hitherto been held *ultra vires* of the Provincial Legisla-

ture, and the Ordinance, in its present form, is to operate with retrospective effect. For the present case before us we assume the correctness of the latter proposition that the Bihar Money-lenders Act applies to transactions under hand-notes. The limited question, however, which we are called upon to decide is the question whether to a transaction like the present S. 4 and other provisions ancillary thereto are applicable. Section 4 reads:

"No Court shall entertain a suit by a money-lender for the recovery of a loan advanced by him after the commencement of this Act, unless such money-lender was registered under the Bihar Money-lenders Act, 1938, at the time when such loan was advanced. Provided that such suit shall be entertainable if the loan to which the suit relates was advanced by the money-lender at any time before the expiration of six months after the date of the commencement of this Act and if he is granted a certificate of registration under S. 5 of the Bihar Money-lenders Act, 1938, at any time before the expiration of the said six months."

The question, therefore, arises whether the transaction evidenced either by Ex. 1 or Ex. 2 is a loan within the meaning of S. 4, and whether the plaintiff, who is a timber merchant by profession, is a money-lender for the purpose of that section. In order to understand the ambit of operation of S. 4, Bihar Money-lenders Act, 1939, you cannot dissociate it from its association with S. 5, Money-lenders Act, 1938. The section in terms requires registration being effected under the Act of 1938. Section 5, omitting the portions not relevant for the purpose of this appeal, reads:

"Any person may make an application to be registered as a money-lender. Every such application shall be in writing and shall state (b) the name and style under which he carries on or desires to carry on business as a money-lender."

It is evident, therefore, that S. 4 is intended to apply to those persons who are money-lenders by profession, or, in other words, who carry on, or desire to do, the business of money-lending. It is apparent on the very face of the above two sections, that is, S. 4 of the Act of 1939 and S. 5 of the Act of 1938, that they were never intended to apply to cases of isolated or intermittent instances of lending, nor to similar other transactions which technically may come within the definition of "loan" and may make the beneficiaries under the transaction come within the definition of "money-lending" for general purposes of the Act. Mr. B. N. Rai insists that the relevant words "loan" and "money-lender" must be understood in the sense assigned to them in the interpretation clause of the Act, may they occur in whatever section and in whatever context. The

Court cannot narrow down their import for the purpose of giving business efficiency to particular provisions in the Act. This argument, however, overlooks the opening words of S. 2, which reads:

"In this Act, unless there is anything repugnant in the subject or context, 'loan' means an advance, whether of money or in kind, on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan and 'money-lender' means a person who advances a loan and shall include a Hindu undivided family and the legal representatives and successors-in-interest, whether by inheritance, assignment or otherwise of a person who advances a loan."

On a plain reading of this section, it is clear that any particular word defined in this section may have a meaning more limited than that given to it in this section, if it is so warranted by the nature of the subject which the section deals with, or by its very context. It has to be borne in mind that whenever any meaning either wider or more limited than its natural connotation is sought to be assigned to an expression occurring in a statute, it has to be defined. Such a meaning is known as "artificial meaning." The Legislature has, therefore, to be cautious to retain its plain grammatical meaning, when placed in a particular context, its artificial meaning will produce repugnancy. The opening words of S. 2 mentioned above are intended to prevent repugnancy.

I have said above how Ss. 4 and 5 cannot be dissociated, and their joint operation forces me to come to the conclusion that the Legislature never intended that a casual money-lending transaction entered under unforeseen circumstances could not be enforced through Court, unless the claimant happened to be a registered money-lender.

Section 4, on the very face of it, is applicable only to transactions subsequent to the passing of this Act, and the section says that in order to get the loan enforced in Court the lender must have been registered at the time when the loan was advanced. In my judgment a case is very easily conceivable in which a man who had not the least intention of carrying on business either in money or in kind, nor even the slightest desire to enter into even a solitary transaction of lending money in cash or kind is so placed as to be bound to take either a bond or a hand-note to ensure payment. It would be absurd to think that before doing so the Legislature wants him to run to the Sub-Registrar and get himself registered as a money-lender. Further when he goes to the

Sub-Registrar in order to get himself registered as a money-lender he has to fill up a form in which he has to state in writing as shown above under S. 5 (b), that either he is carrying on money-lending, or he desires to carry on money-lending. The Legislature, it cannot be held, ever intended that one should make a false statement in his application for registration. If, on the other hand, he does not state that, the Registrar is entitled to refuse him registration. There is a further difficulty, which as at present advised appears to me to be unsurmountable in the appellant's way, that according to the section the plaintiff must have been registered at the time when the loan was advanced. Let us assume for the sake of argument, that the "loan" in S. 4 means a transaction on a bond bearing interest, executed in respect of past liability, as provided in S. 2 (f) of the Act. How can the word "advance" be made applicable to such a transaction? You cannot say that a transaction was advanced. Placed in this context the word "loan" must mean what can be advanced, which may be either cash or in kind. There is a further argument which strikes me that if this transaction is a loan, it is a loan not because the hand-note was executed but not "advanced" on 25th May 1941, but because something was "advanced" previous to the commencement of this Act. To such an advancement, the section, in its very terms, is inapplicable. In my judgment, therefore, the word "loan" and the word "money-lender," as they occur in S. 4, Bihar Money-lenders Act, 1939, and S. 5, Bihar Money-lenders Act, 1938, cannot be interpreted in the more comprehensive and artificial sense assigned to them in S. 2 of the Act. If we do it, it would be repugnant to the very subject, and it would be inconsistent with the context and may lead to absurdity. This interpretation would bring smooth transactions in business life to a standstill. In my view, therefore, the transaction in the present suit is not a loan within the meaning of S. 4.

The only contention advanced by the defendants-appellants in support of their appeal fails. The appeal thus having no merits must be dismissed with costs.

Meredith J.—I am of the same opinion. This is a case of a timber merchant, not of a professional money-lender. It may be that the plaintiff owing to the manner in which "money-lender" has been defined in the Money-lenders Act of 1939 comes technically within the definition of "money-lender." But these definitions are all to be read sub-

ject to the phrase used at the head of S. 2, namely, "In this Act, unless there is anything repugnant in the subject or context." There is nothing inconsistent in holding that the plaintiff may be a money-lender for the purposes of certain sections of the Act while not being a money-lender for the purposes of certain other sections, namely, those sections, in which there is anything repugnant in the subject or context. Section 4 of the Act of 1939 is, in my judgment, one such section. Section 4 must be read together with S. 5 of the Act of 1938, which has not been repealed by the Act of 1939, but rather has been incorporated by S. 4 of the 1939 Act for the purposes of registration. It is, to my mind, perfectly clear reading S. 4 together with S. 5 that these provisions with regard to registration were only intended to apply to a professional money-lender. Were it otherwise, S. 5 (1) (b) could not have required the applicant for registration to set out the name and style under which he carries on or desires to carry on business as a money-lender. He must be either a money-lender by profession, or one who is intending to become so. There is, therefore, clearly repugnancy in the context of these sections to the definition in S. 2 of a money-lender as including everyone who makes a solitary loan.

I further agree with my learned brother that in any event S. 4 can only be meant to apply to loans advanced after the commencement of the Act. Section 4 as worded does not bar a Court from entertaining suits by unregistered money-lenders for the recovery of all loans but only such loans as may have been advanced after the commencement of the Act. Under the definition in S. 2 (f) "loan" may, no doubt, include a transaction on a bond bearing interest executed in respect of past liability, but the use of the word "advanced" in S. 4 here again introduces repugnancy of context, and so limits the application of the word "loan."

V.R./D.H.

Appeal dismissed.

[Case No. 111.]

A. I. R. (33) 1946 Patna 313

FULL BENCH

FAZL ALI C. J., MANOHAR LALL
AND RAY JJ.

Tikait Srinibas Hukum Singh Deo

v.

Deoram Ganjhu and others.

Second Appeal No. 973 of 1936, Decided on 13th February 1946, from decree of Judicial Commissioner, Chota Nagpur, D/- 13th July 1936.

(a) Chota Nagpur Tenancy Act (6 [VI] of 1908) — *Khuntakattidars* — Tenure if always resumable.

Though there is no provision in the Chota Nagpur Tenancy Act giving any permanent rights to *Khuntakattidar* tenure-holders, yet it cannot be said that in every case where the *Khuntakattidars* are entered in the *khewat* as tenure-holders, it must be held as a matter of law that they are merely temporary tenure-holders : ('21) 8 A. I. R. 1921 Pat. 426, *Disting.*; ('33) 20 A. I. R. 1933 Pat. 504, *Ref.* [P 315 C 2]

(b) Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 84 (3) — Entry in survey record of rights—Presumption of correctness.

The entry in the survey record of rights as to the nature of tenancy must be presumed to be correct. Where the entry in the survey record of rights shows that the defendants were in possession of a tenure which was non-resumable, the onus is on the plaintiff to show that the entry was incorrect : ('29) 16 A.I.R. 1929 Pat. 460 (F.B.), *Rel. on.* [P 315 C 2]

Baldeva Sahay and C. P. Sinha—for Appellant.
S. N. Bose and S.N. Banerji—for Respondents.

Manohar Lall J.—This is an appeal by the plaintiff who is aggrieved by the concurrent decisions of the Courts below by which they have dismissed his suit which was instituted for recovery of possession of 124 acres of land in village Khandanishan. The facts are now no longer in dispute. The plaintiff is the proprietor of the Biru estate in the district of Ranchi. Village Khandanishan is a part of that estate. On 14th January 1882, the then Raja, the great grandfather of the plaintiff, executed a registered patta in respect of the village in favour of Thuntha Ram Ganjhu and his son Dangu alias Mahendra as jagir *hinheyati*, that is to say a life grant, on receipt of a nazarana of Rs. 100 and an annual payment of Rs. 25-5-0 besides cess. It is important to state here that in this document it is recited that ten years before this the village had been let out to the *gungles* and they made the lands cultivable. On 13th August 1882, Thutha Ram for self and on behalf of his minor son Mahender sold the village to Hira Singh, who was the son of Raja Hari Ram Singh. After the sale deed, Ex. 6, the vendors reserved the lands now in dispute for themselves—it has been found by the Courts below that these were the lands which were reclaimed by the grantees during the ten years before the grant of 1882. In 1897 the estate was taken charge of by the manager of the encumbered estates. At that time Damar Singh, son of Hira Singh and grandfather of defendant 1, claimed his right to the village on the basis of the sale deed in his favour of August, 1882 just referred to above. This right was recognised by the manager and the village,

therefore, remained in possession of Damar Singh and thereafter in the possession of his son Jagatpal Singh. In the survey record of rights prepared in the year 1908 *khewat* No. 2 was recorded in the name of the Biru estate, but *khewat* No. 3 was recorded in the name of Jagatpal Singh, whose estate was also then under the manager of the encumbered estates. The remarks column contains these remarks : "The interest was mukarari, not resumable and no patta has been produced." The revisional survey record of rights was finally published in the year 1933 in which again *khewat* No. 2 was recorded in the name the Biru estate while *khewat* No. 3 was recorded in the name of defendant 1 with a note to the same effect that the mukarari was not resumable and there was no patta. On these allegations the plaintiff sought to recover possession from defendant 1.

The trial Court came to the conclusion that as the transferor of the predecessor of defendant 1 was holding the village on a grant from the predecessor of the plaintiff as *hinheyati* grant, the village must be held to be resumable as both the grantees are dead. In appeal the learned Judicial Commissioner has come to the conclusion that the manager of the encumbered estate having accepted the claim of Damar Singh and there being a presumption of accuracy of the entry in the survey record of rights, the plaintiff was debarred from putting forward any claim that the village was now resumable. He also pointed to the fact that defendant 1 has been able to produce receipts, Exs. B series and Ex. C (1) in which he or his predecessor-in-interest is described as mukararidar. The receipt Ex. C (1) is of the year 1889 and was actually filed before the manager in 1897. In that receipt Hira Ram Singh the father of Damar Singh is described as a mukararidar. The appeal of defendant 1 was, therefore, allowed. That part of the claim of the plaintiff has not been pressed and cannot be pressed on his behalf in the present appeal. It will be remembered that the original grantees reserved to themselves 124 acres of land when they transferred the village to the predecessor of defendant 1. Regarding this area *khewat* No. 4 was prepared in the record of rights of the year 1908 and the land was recorded in the name of Mahendra; Sukhram and Sukhlal sons of Thutha Ram Ganjhu. Sukhlal is defendant 4 in the present suit. The nature of the rights of *khewat* No. 4 was recorded as 'Lagan Panewala' with the remarks that the tenure was not resumable. In the years 1914, 1916

and 1919 Mahendra and Sukhram alienated 110 acres out of this area in favour of defendant 5, Tilakman Sahu. Thereafter, the revisional survey record of rights was finally published in the year 1933. The original grantees are now dead. Thuntha Ram Ganjhu died before 1916 and Mahender died in 1926. The plaintiff on these allegations sought to resume this land. He also claims mesne profits.

The learned Subordinate Judge dismissed the suit of the plaintiff against defendants 2 to 5 upon the ground that Thuntha Ganjhu had a jungle-tarasi lease from the Raja from before the patta which was granted in 1882 and that this being a lease for cultivating purposes, Thuntha Ganjhu acquired a permanent right in the lands claimed by him. In appeal the learned Judicial Commissioner has also come to the same conclusion. He points out that the patta itself mentions that the jagirdars had reclaimed the cultivable land of the village prior to the year 1882 and that this state of affairs has been recognised at both surveys. There is no dispute that this 124 acres of land was the land which was reclaimed by Thuntha Ganjhu during the ten years he was in possession of the village before it was granted to him in 1882. The learned Judicial Commissioner has found as a fact that it is reasonable to hold from the circumstances that the grantees remained in possession of 124 acres which may be accepted as representing the land which they themselves had previously cleared and brought under cultivation. In second appeal Mr. Baldeva Sahay contends that defendants 2 to 4 have no permanent rights and their position is no higher than that of ordinary khuntkatidar tenure-holders. He points out to a number of sections in the Chota Nagpur Tenancy Act to support his argument that no privilege has been conferred on such persons by any provisions of the Act so as to entitle them to retain possession of the lands against the wishes of the landlord.

It is true that there is no provision in the Act giving any permanent rights to khuntkatidar tenure-holders — see the remarks of a Single Judge of this Court in 14 P. L. T. 457.¹ Attention may also be drawn to Reid's well-known Settlement Report of Chota Nagpur, para. 163, p. 70 where it is stated that "a khuntkatti tenure-holder has no special privileges under the statute law." Our attention was also drawn to Division

Bench decision of this Court in 2 P.L.T. 638.² In that case it was found :

"The entry of Khuntkatti rights in the present case happens to be in the khewat and, therefore, the status of the plaintiffs was recorded as tenure-holders."

It was found as a fact that there was nothing in the record of that case to show that the interests of the plaintiffs were necessarily permanent and not temporary. This case was, therefore, decided on its own facts, and is no authority for holding that in every case when the khuntkattidars are entered in the khewat as tenure-holders, it must be held as a matter of law that they are merely temporary tenure-holders. In my opinion the matter, so far as the present appeal is concerned, is concluded against the appellant by the entry in the survey record of rights which must be presumed to be correct. In that entry it is shown that defendants 2 to 4 are in possession of a tenure which is non-resumable. The onus is on the plaintiff to show that that entry is incorrect, and he has not been able to show to the satisfaction of the Courts of fact below that that entry is incorrect. On the other hand, every indication upon the record is to the contrary direction. It may be observed as was pointed out in 9 Pat. 347³ that the civil Court is not a Court of appeal from the decision of the survey authorities when they make a record in the record of rights. As it is impossible to place all the materials before the civil Court of the enquiry or the facts upon which the survey authorities relied in order to record a particular entry, the statute itself directs emphatically that such an entry must be presumed to be correct unless shown by evidence to be incorrect. The plaintiff in the present case has not shown that the entry is incorrect. There is no onus on the defendants to show as to what were the materials upon which that entry which is in their favour is based or that the entry is correct. For these reasons the appeal is without any substance and must be dismissed with costs.

Fazl Ali C. J. — I agree.

Ray J. — I entirely agree and have nothing to add.

V.W./D.H.

Appeal dismissed.

2. ('21) 8 A. I. R. 1921 Pat. 426 : 63 I. C. 764 : 2 P. L. T. 638, Jeo Lal Singh v. Wazir Narain Singh.

3. ('29) 16 A.I.R. 1929 Pat. 460 : 9 Pat. 347 : 118 I.C. 316 (F.B.), Tengaroo Sukul v. Chathu Bhar.

1. ('33) 20 A. I. R. 1933 Pat. 504 : 148 I. C. 565 : 14 P. L. T. 457, Degan Mahton v. Kamakhaya Narayan.

[Case No. 112.]

* A. I. R. (33) 1946 Patna 316

SINHA AND RAY JJ.

Sm. Kamani Devi alias Sakuntala Devi
— Petitioner

v.

Sir Kameshwar Singh of Darbhanga
— Opposite Party.

Civil Revn. No. 631 of 1944, Decided on 14th November 1945, from order of Sub-Judge, Patna, D/- 11th May 1944.

* (a) Hindu law — Marriage — Gandharva form—Mithila School — Gandharva marriage is not invalid— Wife married in Gandharva form is entitled to maintenance.

The Gandharva form of marriage is not invalid according to the Mithila School of Hindu law. At any rate the relationship of husband and wife created by such marriage is binding against each other and the husband cannot escape his liability of maintaining the wife married in this form, whatever be the consequences upon the children born of such wedlock with regard to their right of inheritance and succession and whatever be her status in relation to her husband's agnatio and cognatio relations : *Case law and texts reviewed.*

[P 324 C 2]

Hindu Law—

('38) Mayne, Page 136.

(b) Hindu law—Marriage—Gandharva form of marriage — Incidents of.

The ancient Hindu law-givers beginning with Manu downwards have all considered the Gandharva form of marriage as one of the eight forms for the Hindus of all castes, but, because in the Gandharva form the bride is not given away by the father to the bridegroom contrary to the principles of *patria potestas* it was considered as one of the unapproved forms by some law-givers. The blame that attached according to them to this form of marriage did not, however, make the marriage void, but created some difference in case of succession to the property of a wife married in the Gandharva form.

[P 323 C 1]

Hindu Law—

('38) Mayne, Page 136.

(c) Hindu law—Marriage —Gandharva form —Performance of nuptial rites necessary.

Celebration of Gandharva form of marriage is to be attended with nuptial rites and ceremonies including homa and saptapadi for its validity.

[P 319 C 1]

Hindu Law—

('38) Mayne, Page 134.

(d) Civil P. C. (1908), O. 33, R. 5 (d) and S. 115 —Order rejecting application under cl. (d) when revisable.

The Court's jurisdiction to reject the application under O. 33, R. 5 (d) is based upon the decision of the question whether the applicant's allegations do not show a cause of action. If the Court commits an error of law or fact in its conclusion on this question in which the question of jurisdiction is involved its conclusion if erroneous leads to an illegal assumption of jurisdiction and is, therefore, revisable.

[P 326 C 1,2]

When a Court rejects an application to sue in *forma pauperis* it decides the question whether

the applicant is entitled to sue without payment of proper court-fee and in doing so it ultimately refuses to try the issue as between the applicant and the opposite party. Its jurisdiction to so refuse is attributable to the statutory enactment of O. 33, R. 5, cl. (d) and if it misinterprets this provision or in holding an inquiry into the applicability or otherwise of this provision of law commits an error of law, it in substance commits a mistake with regard to the ambit of its jurisdiction and therefore this being a question in which the question of jurisdiction is involved its order is revisable under S. 115.

[P 328 C 1]

C. P. C. —

('44) Chitaley, S. 115, N. 26.

('41) Mulla, Page 1044 Note "Revision."

(e) Hindu law — Maintenance — Jural relationship created contrary to shastric injunctions — Person may still be entitled to maintenance.

Instances are not wanting in Hindu law that when a particular jural relationship is created contrary to shastric injunctions, the relationship so created is not null and void for all purposes, however invalid they be for certain purposes only. For instance, in the case of an invalidly adopted son, he may not be entitled to succeed as a validly adopted son but he is all the same entitled to maintenance; similar is the case of an illegitimate son of twice born caste. So is the case of a concubine of a twice born caste under the Hindu law. The best illustration is the case of a wife married from within the prohibited degrees. Though the marriage is void, she is nevertheless entitled to be maintained by her husband.

[P 319 C 1, 2]

(f) Hindu law — Texts — Obligatory and directory provisions.

The Smriti or Dharmashastra comprise three Kandas or adhyayas : (1) Achara (ritual) which comprises rules for the observance of religious rites and ceremonies and social and moral duties of different castes, (2) the Vyavahara (civil acts and rules) which embraces forensic law and practice as well as rules for private acts and contests, and (3) the Prayaschitta (expiation), the atonement or religious penalty for sin. So far as Chaps. 1 and 3 of the Smriti or Dharma Shastra are concerned they do not contain the substantive law governing the rights and obligations as between the parties. They are more or less social or moral codes having no binding effect. They are merely directory and not obligatory.

[P 319 C 2 ; P 321 C 1]

(g) Hindu law—Mithila School — Texts of authority pointed out.

The leading authorities of Mithila School are the Vivadratnakara and Vivadachintamani; concurrently with these are of great weight in Mithila Vivada Chandra by Laxmi Devi, the treatise on inheritance by Srikaracharya the Madan-parijata, the Smriti-sara by Sridharacharya, Smriti-sara by Harinanthopadhaya and the Dwoita-parishista by Meshava Misra.

[P 319 C 2 ; P 321 C 1]

Hindu Law—

('38) Mayne, Page 53, Pts. (f) and (i).

('40) Mulla, Page 12, Pts. (p) and (q).

(h) Hindu law — Marriage — Approved and unapproved forms—Principal difference, stated.

The principal difference between the approved and unapproved marriages is to be found in the

matter of succession to the woman's stridhana. In the former case the husband and in the latter the parents family is preferred. [P 320 C 1]

Hindu Law—

('38) Mayne, Page 132.

('40) Mulla, Page 501.

(i) Hindu law—Marriage—Presumption of validity.

Once it is proved that a marriage has been performed, a presumption of law arises in favour of a valid form of marriage. [P 320 C 2]

Hindu Law—

('38) Mayne, Page 174, Pt. (h).

('40) Mulla, Page 510, S. 438.

(j) Hindu law—Texts—Mitakshara cannot prevail against unequivocal Smriti texts.

Mitakshara cannot prevail against such of the Smriti texts as are unequivocal specially where all the leading commentaries of all the schools are agreed among themselves : 11 M. I. A. 487, *Foll.* [P 322 C 1]

(k) Civil P. C. (1908), O. 6, R. 2—Alternative pleas—Claim for maintenance by wife married in Gandharva form—Alternative plea that even if marriage is invalid it has created right of maintenance in favour of plaintiff is tenable.

Alternative pleas in law are always permissible. In a suit for maintenance by a Hindu wife married in Gandharva form it is open to the plaintiff to say that if according to law the marriage is not valid for all purposes it at least has created in her the right to be maintained by the opposite party. [P 325 C 1]

C. P. C. —

('44) Chitaley, O. 6, R. 2, N. 5.

('41) Mulla, Page 75, Note "Alternative allegations."

(l) Civil P. C. (1908), S. 115—Revision when lies—Principles.

Once a Court rightly assumes jurisdiction to decide a dispute between the parties, it does not exercise its jurisdiction illegally or with material irregularity simply because it decides either a question of law or a question of fact erroneously and in such a case the High Court has no power of revision against a decision of lower Court. But if a question of jurisdiction is involved in his conclusion of law or fact, then the High Court can interfere in the event of such conclusion being erroneous, because that would amount to illegal assumption or exercise of jurisdiction. Similarly, when a Court refuses to decide a matter which it has jurisdiction to decide, its decision can always be interfered with under the section. [P 325 C 2]

C. P. C. —

('44) Chitaley, S. 115, N. 12.

('41) Mulla, Page 419, Pt. (y).

(m) Civil P. C. (1908), O. 33, R. 5 (d) and S. 115—Duty of Court—Court has to see whether allegations *prima facie* show cause of action : ('33) 20 A. I. R. 1933 Pat. 284, *Dissent.*

What a Court has to decide in adjudicating upon the maintainability of a pauper application is whether the allegations, *prima facie*, show a cause of action capable of enforcement in a Court of justice and calling for an answer. It is not open to a Court at the preliminary stage to enter into the merits of the suit and to determine whether the cause of action alleged in the plaint is or is not

well founded. The Court is not acting within the ambit of its jurisdiction when it decides the question on the merits : *Case law discussed* : ('33) 20 A. I. R. 1933 Pat. 284, *Dissent.* [P 328 C 2; P 329 C 1]

C. P. C. —

('44) Chitaley, O. 33, R. 5, N. 5 Pt. 7.

('41) Mulla, Page 1043, Cl. (d) "Cause of action."

(n) Civil P. C. (1908), S. 115—Material irregularity—Judge refusing to bring his mind to bear on real question in controversy acts with material irregularity.

Where in considering an application for leave to sue in *forma pauperis* for a claim for maintenance by a Hindu wife married in Gandharva form the Judge does not apply his mind to the limited question whether wife married in Gandharva form is entitled to maintenance or not, which is the real question in controversy but rejects the application on merits holding that the Gandharva form of marriage is invalid, the Judge acts with material irregularity in the exercise of his jurisdiction and the order passed by him is liable to revision. [P 330 C 1]

C. P. C. —

('44) Chitaley, S. 115, N. 26, Pt. 19.

('41) Mulla, Page 426, Pt. (b).

M. Rahman — for Petitioner.

P. R. Das, L. K. Jha and S. P. Srivastava — for Opposite Party.

Ray J. — The facts and circumstances leading to this civil revision are shortly these: The petitioner Sm. Kamani Devi alias Shakuntala Devi alleges herself to be a cousin of the junior Maharani of the opposite party the Hon'ble Maharajadhiraj Sir Kameshwar Singh of Darbhanga, and during the illness of the Maharani, she had to remain at the Darbhanga Palace at the request of the Maharani and her husband, the opposite party, between April and July 1939. During her stay, there grew intimacy between the applicant and opposite party, and ultimately they married in the Gandharva form and lived as husband and wife with the result that the applicant conceived. Later, she was sent by the opposite party, under the care of her father, to the Patna General Hospital for delivery. In February 1940, a male child was born to her. All the while, the opposite party used to maintain her and bear all her expenses until 1st October 1940. On the opposite party's default to maintain her, with a view to enforce her right to maintenance, she filed an application for leave to sue in *forma pauperis* under the provisions of O. 33, Civil P. C. As required by R. 2 of the Order, the application contained the particulars required in regard to the plaint in the suit showing the cause of action for the same. In those allegations she stated that she was the wife of the opposite party having been married to him in the Gandharva form which is valid according to the Mithila law

by which the parties are governed. The petition for leave to sue as a pauper came up for disposal before Mr. B. K. Sarkar, the then Subordinate Judge, First Court, Patna, who by his order dated 30th January 1943, allowed the petition. Against this order, the opposite party moved this Court in civil Revision No. 60 of 1943, on the ground that the Subordinate Judge contravened O. 33, R. 5 by refusing to hear his counsel on the question whether the allegations in the plaint disclosed a cause of action. This civil revision was disposed of by the Court allowing the application, setting aside the order under revision and remanding the case to the Court below for disposal according to law. The direction given in the order was :

"It is to be distinctly understood that arguments will be confined in the Court below to the question whether the allegations in the plaint disclose a cause of action as provided in O. 33, R. 5, cl. (d) and whether upon those allegations a valid marriage under the Mithila School of Hindu Law can be said to have been contracted. No other extraneous question shall be allowed to be raised or discussed."

Thereupon, the Subordinate Judge, Mr. Yunus after allowing the question referred to him to be fully heard passed the order under revision on 11th May 1944, rejecting the application; and, in doing so, he has come to the finding that the marriage in Gandharva form is not valid amongst Brahmans governed by the Mithila School of Hindu Law, and therefore the statements contained in the plaint do not show a valid cause of action as required by O. 33, R. 5 (d), Civil P. C. He also rejects the alternative prayer for maintenance as a further relief based on the contention that the applicant was entitled to get maintenance even in the event of the marriage connection alleged in the plaint being found illegitimate or illegal, holding such a relief inconsistent with the plaintiff's case.

As against this order of the learned Subordinate Judge, the applicant has come up in revision under S. 115, Civil P. C. The petitioner contends, *inter alia*, (1) that the learned Subordinate Judge should have confined himself to the question whether the allegations *prima facie* show a cause of action but had no jurisdiction to dispose of the complicated case finally on merits at this preliminary stage; (2) that he acted with material irregularity in approaching the question in the way he has done without addressing himself to the pith and substance of the allegations so far as they were relevant to the relief sought; and (3) that the Court's authority to reject an application

for permission to sue as a pauper and thus to deny her a trial is derived from the statutory provisions contained in O. 33, R. 5, Civil P. C., and in this case he has assumed jurisdiction to reject the application on an erroneous view of law governing the question whether the applicant's allegations do not show any cause of action.

The respondent's learned counsel urges two points in reply : (1) That the learned Subordinate Judge's decision, that a Hindu Brahmin governed by the Mithila School of law cannot contract a valid marriage in the Gandharva form, and therefore such a marriage is illegal, is perfectly right; and (2) that even if he is wrong in this view of law, this Court cannot interfere in revision. He very strenuously contends that the learned Subordinate Judge had jurisdiction to decide the question whether the applicant's allegations do not show a cause of action. Having such jurisdiction, it is immaterial whether he decided it wrongly or rightly, and even if he decided it wrongly, he did not exercise his jurisdiction illegally or with material irregularity. For this proposition he has relied upon the case in 11 I. A. 237¹ and certain other authorities to be noticed presently. The question before us, therefore, reduces itself to (1) whether the Subordinate Judge is right in holding that the Gandharva form of marriage amongst Brahmans is invalid according to the Mithila School of the Hindu law; (2) whether the petitioner on her allegations in the plaint has made out a cause of action for a suit for maintenance; and lastly (3) whether a revision would lie.

I shall deal with the first question as above propounded. For the purpose of appreciating the point, I should state somewhat elaborately, the allegations made by the applicant in her application for leave to sue in *forma pauperis*. Her allegations which shall be assumed to be true at this stage of the case are : She and the opposite party are Maithili Brahmans, her cousin being the junior Maharani of the opposite party. During her stay in the Palace on the occasion of her sister's illness, she and the opposite party entered into an agreement for marriage and celebrated the same in the Gandharva form which is valid in Mithila School of Hindu law, that both of them were majors at the time and were, therefore, competent to contract, that the marriage was followed by consummation, that is to say,

1. (85) 11 Cal. 6 : 11 I.A. 237 (P.C.), *Raja Amir Hassan Khan v. Sheo Prakash Singh*.

the opposite party cohabited with her as it happens between husband and wife, that as a result of this sexual intercourse which she believed the opposite party was entitled to have with her as his wife, she conceived and ultimately gave birth to a male child, that she was being treated by the opposite party as his wife in being maintained by him till some time before the filing of this application. She further alleges that this marriage is valid according to the Mithila School of Hindu Law, and then she claims that on account of this marital relationship, she was at least entitled to be maintained by the opposite party. It is well settled in law that celebration of the Gandharva form of marriage is to be attended with nuptial rites and ceremonies including homa and sapatapadi for its validity, and it was conceded by the learned counsel appearing for the opposite party that for determining the question at this stage, it is also to be assumed that in this particular case, all those rites were in fact performed. Cause of action in the case should be limited to a bundle of facts necessary to entitle her to claim maintenance as against the opposite party. It has to be borne in mind that the larger question, namely, whether she has got all the Hindu law rights of a wife as against her husband and his relations, such as, right of succession and inheritance, and whether the issues born out of this wedlock would have all the rights of legitimate issues, is not in issue here. The question has to be examined from this limited aspect only. The Court in order to come to a position to hold that her allegations do not show a cause of action will have to find that she has not made out a case for enforcing a right to maintenance as against the opposite party and nothing more or nothing less. Unfortunately in this particular case, the learned Subordinate Judge has not kept this in view. While discussing the question of Hindu law of Mithila School in point, he has not brought his mind to bear upon deciding what is the scope of the cause of action in the suit before him. He should have borne in mind that instances are not wanting in Hindu law when a particular jural relationship is created contrary to the Shastric injunctions, the relationship so created is not null and void for all purposes however invalid they be for certain purposes only. For instance, in the case of an invalidly adopted son, he may not be entitled to succeed as a validly adopted son, but he is all the same entitled to maintenance. Similar is the case of an illegitimate son of a twice born caste

who, though excluded from inheritance, is entitled to be maintained out of the estate of his father. So is the case of a concubine of a twice born caste under the Hindu law. The best illustration is the case of a wife married from within the prohibited degrees. Though the marriage is void, she is nevertheless entitled to be maintained by her husband (*vide* Trevelyan, Hindu Law. p. 49).

The learned Subordinate Judge, too, in my view, has in his examination of the authorities on Hindu law bearing upon the question of validity of a Gandharva form of marriage, missed the elementary distinction between obligatory and directory provisions. The Smriti or Dharamshastra comprise three kandas or adhyays, that is, (1) Achara (ritual) which comprises rules for the observance of religious rites and ceremonies and social and moral duties of the different castes, (2) the Vyavahara (civil acts and rules) which embraces forensic law and practice as well as rules for private acts and contests; and (3) the Prayashchitta (expiation,) the atonement or religious penalty for sin (*vide* Preface p. 11 of Vyavastha Chandrika by Shyama Charan Sarkar). So far as Chaps. I and III of the Smriti or Dharma Shastras are concerned, they do not contain the substantive law governing the rights and obligations as between the parties. They are more or less social and moral codes having no binding effect. In this view of the matter, the law relating to the validity of the Gandharva marriage must be sought for in the Vyavahara Kanda and unless Gandharva form of marriage is declared to be null and void by the substantive law, any direction laying down the social and moral duties for the Brahmmins recommending them not to perform such marriages will not in the least invalidate it. With regard to the leading authorities governing the different schools of Hindu law, it is well settled that Mitakshara is considered as the main authority for all the schools of law with the sole exception of that of Bengal. Besides, there are certain other schools in which certain other works are respected concurrently with the Mitakshara, particularly on account of their adopting certain doctrines which are inculcated in those books. Accordingly the leading authorities of Mithila are the Vivadaratnakara and Vivada-chintamani; concurrently with the above are of great weight in Mithila (1) Vivada-chandra by Lakshmi Devi, the treatise on inheritance by Srikaracharya, the Madana Parijata, the Smriti-sara, by Sridharacharya, Smriti-sara

by Harinanthopadhaya and the Dwoita-parishishta by Meshava Misra. Of these, Vivada-chintamani was composed by Vachaspati Misra who was also the author of several other works, namely, Vyavahara Chintamani commonly cited by the name of Misara; these also are of great authority in Mithila.

The learned Subordinate Judge has relied very strongly upon Kritya Chintamani by Vachaspati Misra which is a book on Achara only and has not referred to any of the above authorities. I will have to consider presently the authority of this work.

The fundamental conception of Hindu law with regard to the relationship between husband and wife are thus expressed by Manu: The husband receives his wife from the Gods; he must always support her while she is faithful. Let mutual fidelity continue until death. This may be considered as the summary of the highest law for husband and wife (*vide* Mayne, p. 106). According to Manu, Gandharva form of marriage was one of the eight forms and he defines this to be the voluntary union of a maiden and her lover; this is also accepted to be a valid form of marriage by Gautama, Baudhayana, Vishnu, Yajnavalkya and Narada. The commentators regarded the Brahma, Daiva, Arsha and Prajapatya forms of marriages as the approved or blameless forms and the other ones beginning with Gandharva as the unapproved or blameworthy marriages. The principal difference between the approved and unapproved marriages is to be found in the matter of succession to the woman's stridhan; in the former case the husband and in the latter the parents family is preferred. Evidently the reason was that originally in the case of approved marriages, she passed into her husband's gotra and in unapproved marriages she did not. The difference is explained by Madhava:

"In the forms of marriage beginning with Gandharva, there is no gift of the maiden, the gotra and pinda of the father do not cease."

Both usage and the inclusion in the Mitakshara of the wife as a sagotra sapinda have given her the gotra of her husband in all forms of marriage. Courts have also held that a wife passes into her husband's family and gotra without distinguishing between the forms of marriage: Mayne, 10th Edn., para. 89, pp. 132 and 133.

In my view, the learned Subordinate Judge has completely misdirected himself in his review of the judicial pronouncements and ancient texts of Hindu law bearing upon the

question at issue. His discussion of the subject bears an impress throughout of an assumption on his part that no nuptial rites are required to be performed in a Gandharva marriage and that no such rites were performed in this particular case. At this stage of the case he cannot make an assumption of either the one or the other. It is well-settled that once it is proved that a marriage has been performed, a presumption of law arises in favour of a valid form of marriage. It follows, therefore, that if law requires as pronounced in 12 Mad. 72² nuptial rites to be performed for a valid Gandharva marriage, it will have to be assumed at this stage not only that a marriage was performed between the parties but it was performed with due nuptial rites. The learned counsel, Mr. P. R. Das, appearing for the opposite party, conceded with his usual candour that performance of such nuptial rites should also be assumed for the purpose of testing if the allegations made out a cause of action.

The learned Subordinate Judge sums up the result of the decisions of the Court as tending to show that Gandharva form of marriage is obsolete except amongst the warrior castes. Whether any form of marriage which was recognised as valid by the Smriti-writers has subsequently become obsolete amongst classes of people other than warriors is more or less a question of fact. The applicant who avers that this marriage is valid according to Mithila law is entitled to adduce evidence to show that it is not so obsolete in the area governed by Mithila School. It is not necessary to plead that such marriage has grown up by custom. It has simply to be shown that it has not died out. This can be established either by adducing evidence of instances of such marriages being still prevalent or by showing that they were held valid by the commentators of great repute in the Mithila School or by both. I shall presently show from Vivada Chintamani and Vivada Ratnakar, the two highest authorities in Mithila School that Gandharva marriage was prevalent in Mithila when their authors flourished and was considered in respect, at least, of certain disputes to be as good as the four approved forms of marriage. In my view, in his review of the decisions of the British Indian Courts he has missed the real point.

With regard to his review of the judicial decisions, 12 Mad. 72² stands good law notwithstanding what has been said in 24

M. L. J. 271³ and A. I. R. 1925 Mad. 497.⁴ In 24 M. L. J. 271³ the observations of Abdur Rahim J. relied upon by the Subordinate Judge are *obiter dicta*, inasmuch as in that case the alleged marriage was not proved. Besides Abdur Rahim J.'s view is influenced probably by his opinion that no nuptial rites are required to be performed in Gandharva form. The learned Chief Justice in A. I. R. 1925 Mad. 497⁴ defines the marriage without nuptial rites to be Gandharva marriage. It is clear from his decision that if a marriage proceeding from reciprocal desire is attended with or followed by the essential nuptial rites he should not regard it as an invalid marriage. In 3 ALL. 738,⁵ the learned Judges deciding the case have also considered a case of marriage without nuptial rites and, therefore, they said that the marriage was nothing more nor less than concubinage. 48 ALL. 126⁶ simply follows the earlier Allahabad case and Daniel J., described it as unregulated indulgence of lust, evidently, dealing with the case where no nuptial rites had been performed.

In short, none of these cases supports the view that where a Gandharva form of marriage is associated with performance of appropriate nuptial rites the marriage would still be invalid amongst the Brahmins. It is, therefore, wrong to say that 12 Mad. 72² has been modified by the subsequent decisions of that Court. With regard to his review of ancient Hindu Law texts, the one error which pervades, and thus vitiates it, is that he makes no distinction between those that deal with Vyavahara, i. e., the Hindu forensic law and practice and those that are Achar and Prayashchita. The latter two kandas are merely moral and social codes and thus they are merely directory but not obligatory. Had he kept this distinction in view, he would not have held what is said by Vachaspati Misra in *Kritya Chintamani* as conclusive on the subject. In this mistaken view he has brushed aside what is said by the learned author in *Shradh Chintamani* wherein he recognises the validity of a Gandharva marriage wherein marriage by cohabitation is followed by nuptial rites. His reconciliation of the apparent contradiction by reference to Devala who is a Smriti-writer and who propounds the necessity of

essential nuptial rites in Gandharva marriage and its validity for all castes makes it clear that he (Misra) recognises Gandharva marriage as valid marriage and, therefore, *Shradha Chintamani* is in conflict with *Kritya Chintamani*. Besides, I have shown already that *Kritya Chintamani* is also in conflict with *Vivada Chintamani* which is the real authority in the Mithila School of law. *Kritya Chintamani* can be explained on the ground that it is an Achar Kanda and as such is only recommendatory.

Besides the above, certain other glaring errors have crept into the learned lower Court's review of the texts of ancient Hindu law-givers. He assumes, as against the decision in 13 Pat. 550,⁷ that *Sulapani* is an authority in the Mithila School. *Sulapani* is an author of two different treatises. His commentary on *Yajnyavalkya* called *Dipakalika* which is apparently a Code of Hindu forensic law and practice, to use the words of Colbrooke in his preface, page XV, "is in deserved repute with the Gauriya School" while treatises on penance and expiation are in great repute with both schools, namely, Gauriya and Mithila (Colebrooke's Preface, P. XX). This is confirmed by reference to Morley's Digest CCXIII by Dhavle J. in 13 Pat. 550⁷ wherein it is said that *Sulapani*'s treatises on penance and expiation are regarded as an authority in Bengal and Mithila; but we are not concerned here with penance, expiation and rituals but with Hindu law or Jurisprudence. Therefore the learned Court's reliance on *Sulapani* quoted from Colebrooke's Digest, Book III, p. 605 is completely misconceived, because if that is a part of his commentary on *Yajnyavalkya* it may be good law in Gauriya's School but not so in Mithila School. If, on the other hand, it is a quotation from his treatise on penance and expiation which, though highly regarded in Mithila School is of no use for the purpose of deciding the question of law.

The learned lower Court, while dealing with the subject, has failed to notice how Colebrooke treats the subject in his 4th Edn. p. 614 etc. In this part the author shows on interpreting the texts bearing upon the question that Gandharva is one of the unblamable forms of marriage and the stridhan of the wife married in this form is inherited by her husband. Reference is also made therein to Manu, Narada, Yama and other Smriti-writers as being of the same opinion. As I have said above the learned lower Court's

3. ('13) 21 I. C. 724 : 24 M.L. J. 271, *Visvanathaswamy Naicker v. Kamu Ammal*.

4. ('25) 12 A.I.R. 1925 Mad.497:48 Mad. 1:93 I.C. 705, *Maharaja of Kolbapur v. Sundram Ayyar*.

5. ('81) 3 All. 738, *Bhaoni v. Maharaj Singh*.

6. ('26) 13 A. I. R. 1926 All. 1 : 48 All. 126 : 90 I. C. 358, *Kishan Dei v. Sheo Paltan*.

7. ('34) 21 A. I. R. 1934 Pat. 398 : 13 Pat. 550 : 152 I. C. 446, *Kamla Prasad v. Murli Manohar*.

mistake is due to his misconception as to fundamental difference between Achara, penance and expiation (rituals and moral injunctions) on one hand and Vyavahara (forensic law and jurisprudence) on the other. In one part of his judgment, the learned Subordinate Judge has brushed aside the law given by Manu, the first Smriti-writer, and Kulakabatta, a commentator of Manu, observing that they refer to a stage of civilisation which is a thing of the past and gives preference to what Mitakshara says on the subject. But it has been laid down by the Privy Council in 11 M.I.A. 487⁸ (*vide* Mayne, p. 138).

"Mithakshyar cannot prevail against such of the smriti texts as are unequivocal specially where all the leading commentaries of all the Schools are agreed amongst themselves."

I shall presently show that Vivada Ratnakar of Chandeshwar and Vivada Chintamani of Vachaspati Misra are agreed in accepting the texts of Manu to the effect that the Gandharva form of marriage is one of the higher forms in which the wife's stridhan goes to the husband. In my view, therefore, the conclusion to which the trial Court comes to on review of decisions of Courts and texts of Hindu law-givers and commentators is wrong or at any rate inconclusive. I shall presently show how the authorities stand in favour of validity of Gandharva marriage while there are some which though not irreconcilable are apparently against it. This will clearly demonstrate that the question is too complicated and complex to be dealt with in this summary manner at this preliminary stage as has been done by the learned Subordinate Judge. It may be noticed here that how summarily the lower Court disregards the discussion of the subject in the edition of Mayne on Hindu Law by Srinibas Iyengar observing that he is not an authority on Hindu law, but Iyengar has based his discussion on ancient texts and standard authorities on Hindu law. His edition, therefore, does not deserve this scant treatment.

Next I shall proceed to show somewhat elaborately though not exhaustively how the validity of a Gandharva marriage stands with reference to Hindu law texts of unquestioned authority including those which are regarded as of very high repute in the Mithila School. It is clear, therefore, that according to the Mitakshara the relationship of wife and husband is established, even, by a marriage in Gandharva form.

Shyama Charan Sarkar in his Vyavastha Chandrika, Vol. II, page 443 of the Vyavastha part, says:

"Jagannatha, however, has very justly said that at present the Brahma nuptials only are practised by good men; but even the marriages called Asura, Gandharva, Rakshasa and the rest are sometimes practised by others. (Colebrooke's Digest, Vol. III, page 566.)"

The same learned author at page 444 quotes Yama and Devala. Yama says:

"Neither by water nor words of mouth can a man be said to be the husband of a girl; he becomes her husband by the performance of the nuptial rites and by (the bride) stepping on the seventh step."

and Devala says:

"The nuptial rites are ordained in the marriages styled the Gandharva and the rest; to this contract the nuptial fire must be made witness by men of the three classes (Colebrooke's Digest, Vol. II, London Edition, page 606.)"

Dr. Jolly on Hindu Law and Custom at pages 110 and 111 says that in the Smritis the choice of husband is allowed to the young lady if she is not given in marriage even after some time has passed after her attainment of puberty. The motive in this is that the father loses his authority over the daughter through his delay in giving her away in marriage; at page 111-112 he says:

"The Gandharva Vivaha too, the love marriage without the consent of the parents, seems in the first place to have been a privilege of the nobles and therefore can be connected with the Rakshasa Vivaha, i. e., the bride on understanding with her lover, is forcibly carried away from the house of her parents. The best known and often quoted example of a pure Gandharva marriage out of epic is the story of Sakuntala and Dusyanta and a secret marriage of this sort without nuptial ceremonies has even been called the most appropriate form of marriage for the Kshatriyas. . . . There was a difference of opinion as to whether the usual marriage ceremonies are necessary or are superfluous in case of a Gandharva Vivaha. Already Devala recommends the performance of these ceremonies and Kamas 228F. too advises the lover to perform sacrifices into the fire and to take the bride thrice round the household fire, because the marriage would therewith be as good as concluded, and the parents, in order to avoid public scandal would have to give their consent to it. The Gandharva marriage is moreover praised as being on the whole the best form of marriage. . . . It is also opined in the Smritis (Narada and Baudhayana) that this form of marriage is open to all castes alike."

Trevelyan summarises (at page 60) the law relating to Gandharva marriage on reference to various authorities in this way:

"This form of marriage is said to exist still in the family of the Tipperah Rajas, and it was recently asserted to have taken place in a family in Ganjam. A religious ceremony is now as necessary in a marriage in this form as when the marriage takes place in the ordinary forms. The Gandharva form of marriage as now celebrated

8. ('66-67) 11 M. I. A. 487 : 2 Suther 124 : 2 Sar. 327 (P.C.), Bhagwan Deen v. Mayne Bae.

and the ancient form seem, therefore, to resemble one another in name only."

To sum up, it is well settled that the ancient Hindu law-givers beginning with Manu downwards have all considered the Gandharva form of marriage as one of the eight forms for the Hindus of all castes, but because in the Gandharva form the bride is not given away by the father to the bridegroom contrary to the principles of *Patria potestas*, it was considered as one of the unapproved forms by some law-givers. The blame that attached according to them to this form of marriage did not, however, make the marriage void, but created some difference in case of succession to the property of a wife married in the Gandharva form. The theory was that as the father had not made over the bride, therefore the bride's gotra continued to be the same as that of the father, and therefore on the death of such a wife, the father in preference to her husband had the better right to succeed. But in other respects even some of those old law-givers said that Gandharva Vivaha was the best form of marriage. According to some of the law-givers, Gandharva marriage is compared to concubinage, but as has been very clearly pointed out in Mayne at page 134, para. 92 this was due to a misconception. Manu enumerated the eight forms of marriage for Hindus irrespective of any caste, but did not say anything about the nuptial rites being performed. This in the view of the later commentators was considered to be a concubinage, because it was not accompanied with the necessary nuptial rites, such as, giving away the bride in midst of festivities known as kanyadan, recital of vedic mantras at the time of panigrahan, sacrifice into the fire known as nuptial fire and proceeding of the young couple seven steps together called saptapadi. But the mistake committed by those commentators was that Manu did never mention of any nuptial rites in connection with any other form of marriage too. So far as nuptial rites are concerned, they are mentioned in grihashutra, and, as already mentioned, Devala and certain other commentators have said that nuptial rites, such as above excepting kanyadan, are necessary even in the case of a Gandharva form of marriage. Therefore, a Gandharva form of marriage proceeding from love and desire and based upon mutual consent of the bride and the bridegroom, followed by the performance of nuptial rites would be found to be completely blameless

like any other form. And it would be all the more so when it is found that the father has delayed in giving the bride to a suitable bridegroom even for some time after her attainment of puberty which is the case in all instances of major girls and which is a matter of evidence.

Now, therefore, let us examine how does the Gandharva marriage stand with regard to its validity in the Mithila School of Hindu law. It is agreed on all hands as well settled that Vivada Ratnakar and Vivada Chintamani are the highest authorities in the Mithila School of Hindu law. Vivada Ratnakar has been translated by J. C. Ghosh, Hindu Law, vol. II, p. 572. The author of Vivada Ratnakar who is also held in a very high esteem by Vachaspati Misra, and is very often quoted in his Vivada Chintamani, in Chap. X deals with the several rules of succession to stridhana of childless woman according as she is married in one form of marriage or other. In Para. 1 of the chapter the author of Vivada Ratnakar says :

"Now is discussed the rule of succession to the wealth of a childless woman according to form of marriage. Narada says : Property of a woman shall go to her offspring; if she have no offspring, it is declared to go to her husband if she was married according to one of the four approved forms beginning with the Brahma form: if she was married according to one of the other forms, it shall go to her parents."

The four forms are mentioned not for the purpose of excluding the fifth. Therefore the wealth of a childless woman married in Brahma, Daiva, Arsha, Gandharva and Prajapatya, on her death goes to the husband; the wealth of one married in one of the other forms Rakshasha, Asura and Paisacha, goes to the father. This refers to property received at the time of marriage. Manu says :

"It is ordained that the property of a woman married according to the Brahma, the Daiva, the Arsha, the Gandharva or the Prajapatya rite shall belong to her husband alone, if she dies without issue."

Aprajayam means without issue. Devala says :

"The property of a woman on her death is taken in common by her sons and maiden daughters ; in default of issue, the husband, the mother, the brother or the father shall take."

Ghosh in the same volume at p. 699 has also incorporated a translation from Vivada Chintamani of Vachaspati Misra on the subject. Vivada Chintamani, verse 233 :

"Manu says: It is admitted that the property of a woman married according to (any of) the ceremonies called Brahma, Daiva, Arsha, Gandharva and Prajapatya, shall go to her husband, if she die

without issue. But her wealth, given to her on her marriage in the form called Asura or either of the other two (Rakshasa and Paisacha) is ordained on her death without issue, to become the property of her mother and father."

These translations quoted from the two highest authoritative commentators make it very clear that Gandharva marriage is considered to be one of the approved forms of marriage for the purpose of succession to the property of a wife dying without issue. This could not be so, if Gandharva marriage was considered to be a sort of concubinage by the aforesaid commentators of the Mithila School and if as such it was considered to be invalid. On the contrary, Vivada Ratnakar having quoted Devala in support of his interpretation of the text of Narada accepts Devala's view that nuptial rites are not dispensed with in the case of a marriage in the Gandharva form. The learned counsel for the opposite party has relied upon a passage in Kritya Chintamani compiled by the same author. Therein, after narrating the eight forms of marriage commencing with Brahma and ending with Paisacha, the author says:

"For a Brahmin, however, there are only four forms of marriage commencing with Brahma. All forms of marriage are for castes other than that."

According to the order of enumeration the first four commencing with Brahma will exclude Gandharva, and therefore it is argued that according to Vachaspati Misra who is the highest authority in the Mithila School a Brahmin cannot marry in Gandharva form, and, therefore, any marriage according to that form must be deemed to be held invalid by Vachaspati Misra. I have just quoted Vachaspati Misra from his Vivada Chintamani which adopts Manu's text in which Gandharva is considered to be one of the approved forms of marriage. To the same effect is Vivada Ratnakar. It falls, therefore, to be considered which view of Vachaspati Misra is correct. In my opinion there is no discrepancy between the two. What is stated by Vachaspati Misra in Vivada Chintamani is law, while what he writes in Kritya Chintamani is more or less a social or moral rule. Kritya Chintamani has nowhere been accepted to be an authority in the Mithila school of Hindu law. I have had the advantage of reading Kritya Chintamani, and I have found that this is a book on rituals. The contents of the book will show that he does not deal with Vyavahara or law but deals with Achara. The subject heads dealt with in this Code are various Hindu festivities and the cere-

monials and rituals connected therewith. It is frankly conceded by the opposite party that this book has not been referred to in any decided case so far and none of the standard authors of Hindu law have referred to this book as being one of authority in the Mithila school of Hindu law except by way of a general reference in terms such as that the Vivada Chintamani, Vyavahara Chintamani and other works of Vachaspati Misra commonly cited by the name of Misra are all considered as great authority in Mithila. In my view, therefore, the passage in Kritya Chintamani has not authority of law. At any rate, it cannot be considered to have laid down that if a Brahmin enters into a Gandharva form of marriage—by Gandharva form of marriage we must understand a marriage between two adults, male and female, based upon their mutual agreement followed by performance of all the nuptial rites including *homa* and *saptapadi*, either followed or preceded by consummation—that marriage creates no jural relationship between the married couple. It cannot be conceived for a moment that while Vachaspati Misra in his Vivada Chintamani gives such a high position to Gandharva marriage for the purpose of succession of the wife's stridhana by the husband he should consider the marriage void for all other purposes. In the case of this sort of discrepancy the usual presumption of validity of marriage, if performed, must prevail. In my view, therefore, the Gandharva form of marriage is not invalid according to the Mithila School of Hindu law. At any rate, the relationship of husband and wife created by such marriage is binding against each other and the husband cannot escape his liability of maintaining the wife married in this form, whatever be the consequences upon the children born of such wedlock with regard to their right of inheritance and succession and whatever be her status in relation to her husband's agnatio and cognatio relations. J. C. Ghosh at pp. 798 and 799, while considering the validity of this marriage observes that the Madras High Court has taken the right view, namely, that such marriages (Gandharva) may be valid if contracted with a virgin and if nuptial rites with *homa* are subsequently performed. G. D. Banarji, in his Tagore Law Lectures on Marriage and Stridhana at p. 102, after quoting Macnaghten, says:

"But the correctness of this opinion of Macnaghten appears to have been questioned by the High Court

of Bengal in 1 W. R. 194⁹ and it is contrary to the opinion of Jagannatha, which is based upon the following text of Devala: 'Nuptial rites are ordained in the marriage styled gandharba and the rest; to this contract the nuptial fire must be made witness by the men of the three classes; and it seems that the only formality which may be dispensed with in the gandharba marriage is the formal gift of the bride by her guardian, she being in this instance considered self-given.'

In my opinion, therefore, the view taken by the learned Subordinate Judge is completely wrong, and further it is clear however that he has not brought his mind to bear upon the question at issue in its true perspective. The case before him was whether in view of the allegations made by her, the applicant was entitled to call upon the opposite party to maintain her. It is apparent on the face of his judgment that he has not applied his mind to this very limited question raised in the plaint. He has misdirected himself by entering into a consideration of validity at large of Gandharva marriage. It may be assumed for the purpose of this case that this marriage may not be as valid as the four approved forms of marriage for all other purposes including questions of inheritance, succession, etc., but there is no authority for the proposition that a husband after taking a wife in this form of marriage and after consummating the same and thereby disabling the wife from taking another husband would be free to escape the consequence of his own act by denying her the bare right of maintenance. A question of estoppel may well operate against the husband denying the relationship. The learned Subordinate Judge is also wrong in observing that the plaintiff was not entitled to claim maintenance even on the ground that she is the illegitimate wife of the opposite party. I do not find any inconsistency in the claim. The plaintiff's case is that she was married to the opposite party in a particular form, and it is quite open to her to say that if according to law this marriage is not valid for all purposes, it at least has created in her the right to be maintained by the opposite party. There is no inconsistency in facts, and alternative pleas in law are always permissible, and there is nothing wrong in that. In my view, therefore, the allegations in the plaint do show a cause of action for the plaintiff's right to maintenance as against the defendant.

The next important question to be considered is whether, assuming that the learned Subordinate Judge is wrong in his view of

law, this Court has got the power to interfere in revision under S. 115, Civil P. C. This section has been interpreted from time to time in judicial pronouncements beginning with the case in 11 I. A. 237¹ mentioned above. The next case on the point that came up before the Judicial Committee was the one reported in 16 I. A. 104.¹⁰ This case simply upheld the decision of a Court who had given effect to the interpretation of S. 622, Civil P. C., corresponding to the present S. 115 as laid down in 11 I. A. 237.¹ The point again came up for consideration in 44 I. A. 261¹¹ at p. 261. Their Lordships of the Privy Council observed:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In 27 I. A. 216¹² their Lordships observed:

"It (the Court) made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right. . . . But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law."

Bearing in mind the principles enunciated in these three cases the position comes to this: that once a Court rightly assumes jurisdiction to decide a dispute between the parties, it does not exercise its jurisdiction illegally or with material irregularity simply because it decides either a question of law or a question of fact erroneously, and, in such a case, High Court has no power of revision against a decision of the lower Court. But if a question of jurisdiction is involved in his conclusion of law or fact, then High Court can interfere in the event of such conclusion being erroneous, because that would amount to illegal assumption or exercise of jurisdiction. A third case that might arise is when a Court refuses to decide a matter which it has jurisdiction to decide, its decision can also be interfered with under the section. Applying these principles to the facts of this case, the question resolves itself to this: Whether any question of jurisdiction is involved in the learned Subordinate Judge's conclusion on the question whether the allegations in the applicant's plaint do not show a cause of action. If the answer to this is in the affirmative, then the order

10. ('89) 16 Cal. 749; 16 I. A. 104; 5 Sar. 362 (P. C.), Muhammad Yusuf Khan v. Abdul Rahman Khan.

11. ('17) 4 A. I. R. 1917 P. C. 71; 40 Mad. 793; 44 I. A. 261; 40 I. C. 650 (P. C.), Balkrishna Udayar v. Basudeva Aiyar.

12. (1900) 25 Bom. 337; 27 I. A. 216; 7 Sar. 739 (P. C.), Malkarjan v. Narhari.

9. (1864) 1 W. R. 194, Chukrodhuj Thakoor v. Bee Chunder Joobraj.

of the Subordinate Judge is revisable. If the answer is in the negative, then no revision would lie. In order to examine the question, the scheme of O. 33, Civil P. C., has to be kept in view. This order of the Code prescribes a special procedure for suits by paupers. Under the law every subject has a right to have his suit, however frivolous, fully tried and decided in case he files his plaint with proper court-fees provided for by fiscal legislation; but it is only in some special cases and on compliance with some special requirements that a suit can be entertained and tried when filed by a pauper without payment of proper court-fees. Order 33, therefore, is a special procedure to meet special cases. In order that a party can be allowed to sue in *forma pauperis*, he has to fulfil certain conditions as laid down in the said order. Rule 1 defines a pauper. Rule 2 prescribes the particular form that the application for permission to sue as pauper shall take. Rule 3 prescribes the mode of presentation of such an application and R. 4 makes it discretionary with the Court to examine the applicant regarding the merits of the claim and his pauperism. Rule 5 confers jurisdiction on the Court to reject such an application on the happening of certain contingencies as enumerated in the several clauses of the rule. Rule 5 provides: "The Court shall reject an application for permission where the applicant is not pauper." Suppose the trial Court takes an erroneous view of the law defining the word "pauper" in explanation to R. 1 and relying upon this erroneous view of his, rejects the application for permission to sue, the question will naturally arise whether any question of jurisdiction is involved in the lower Court's conclusion on this question. My answer is in the affirmative, because the Court's jurisdiction to reject an application without allowing the applicant or the plaintiff to have a trial is a special jurisdiction. Assumption of this jurisdiction depends upon his conclusion on the question whether the applicant is a pauper or not. If he is a pauper, the Court has no jurisdiction to reject his application. If he is not a pauper, the Court is bound to reject it. In my view, therefore, this is a question of law or fact as the case may be in which the question of jurisdiction is involved. We are here concerned with the learned Subordinate Judge's conclusion on R. 5, cl. (d). Here similarly the Court's jurisdiction to reject the application is derived from or is based upon the

decision of the question whether the applicant's allegations do not show a cause of action. If the Court commits an error of law or fact in his conclusion on this question in which the question of jurisdiction is involved, his conclusion if erroneous leads to an illegal assumption of jurisdiction and is, therefore, revisable. The learned counsel for the opposite party contends strenuously, in terms of the decision of the Judicial Committee in 11 I. A. 237,¹ that the Subordinate Judge had jurisdiction to decide the question whether the allegations of the applicant do not show a cause of action, and having jurisdiction to decide it, if he decided it wrongly, that does not amount to either acting without jurisdiction or acting illegally or with material irregularity in exercise of his jurisdiction. It is, however, to be borne in mind that if this contention be accepted, then S. 115 should be completely nugatory because in some instances Court before assuming jurisdiction has to decide some question of jurisdiction, and if he decides wrongly, there would be no remedy available. Such an aspect of the thing had to be dealt with by their Lordships of the Privy Council in 44 I. A. 261.¹¹ I invite reference to a passage at p. 267. What happened in that case was that a District Judge acting in exercise of the powers conferred upon him by S. 10, Religious Endowments Act (20 [XX] of 1863) decided that the election of a member to fill up the vacancy in an endowment committee was regular and he by his order accepted him as a member of the committee on an erroneous construction of the statute which on the contrary requires that the vacancy has to be filled up by the members of the committee by election and until that is not done, the District Judge has no power to deal with the matter. Against this order, a revision was filed before the Madras High Court. At the hearing of the application a preliminary objection was raised that on the construction of the statute a petition for revision of the order of the District Court did not lie. The High Court overruled the preliminary objection and set aside the District Judge's order as made without jurisdiction. Against this there was an appeal to the Judicial Committee, and the preliminary objection that the petition did not lie under S. 115 was also raised and discussed there. In overruling that objection their Lordships said:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-

exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie."

It is evident from the observation of their Lordships that it is not every erroneous decision either of law or fact of a Court that is immune from revision by the High Court; if in their Lordships' own words the conclusions of law or fact be one in which the question of jurisdiction is involved, then, by all means, such conclusions are revisable by the High Court. It will be profitable here to refer to the case in 4 Pat. L. J. 340.¹³

In that case a judgment-debtor who subsequent to the sale of his immovable property in execution sold his property privately, applied to have the auction sale set aside under O. 21, R. 89. The question that was discussed before the executing Court was whether the judgment-debtor was competent to apply under that rule. The lower appellate Court reversing the decision of the executing Court came to a decision that the judgment-debtor in that case was not competent to apply under the rule. Against this order a revision was directed to this Court and Mullick and Jwala Prasad JJ. overruled the preliminary objection, and set aside the order of the appellate Court. Mullick J. said:

"In my opinion the principles in 27 I. A. 216¹² do not apply. Here the Court could only adjudicate upon the application if it was presented by a person fulfilling the character required by R. 89. The Court's decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction. An erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground for interference under S. 115, Civil P. C., but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers it at once comes within the purview of the section. The judgment of their Lordships of the Privy Council in 44 I. A. 261¹¹ is in my opinion authority for this view."

The point again came up for consideration in 14 Pat. 488.¹⁴ In that case the question arose whether a particular application that was filed before a Court in a mortgage suit in which a preliminary decree had been passed, was one seeking to record a compromise under O. 23, R. 3, Civil P. C. A conten-

13. ('19) 6 A.I.R. 1919 Pat. 501 : 4 Pat. L. J. 340 : 51 I.C. 873, *Mt. Dhanwanti Kuer v. Sheo-shanker Lal*.

14. ('35) 22 A.I.R. 1935 Pat. 385 : 14 Pat. 488 : 155 I.C. 976, *Haribar Prasad v. Gopal Saran*.

tion against the maintainability of this application was to the effect that it was an application under O. 21, R. 2, and, as such, it was barred by limitation, and therefore it could not be entertained under O. 23, R. 2. In short, the question was whether the application answered the description given in O. 21, R. 2 or O. 23, R. 3, Civil P. C., as in the present case the question is whether the plaintiff is one falling within the mischief of R. 5 (d) of O. 33. The Subordinate Judge entertained the application under O. 23, R. 3. This order was sought to be revised in this Court under S. 115, Civil P. C. It was contended on behalf of the opposite party in that revisional proceeding that the Subordinate Judge had the jurisdiction to decide whether the application fell within the provisions of O. 23, R. 3 or within that of O. 21, R. 2, and if his decision be right or wrong, this Court had no jurisdiction to interfere by way of revision. In overruling this preliminary objection, Courtney-Terrell C. J., quoted with approval the dictum propounded by Mullick J. in 4 Pat. L. J. 340,¹³ above cited, and then said:

"Indeed learned counsel for the opposite party was constrained to admit that if a particular jurisdiction originates in some special law or enactment, the High Court can always interfere in the sense that it can construe the law and in accordance with that construction compel the lower Court to exercise such jurisdiction or to refrain from exercising the jurisdiction if not warranted by the law or enactment in question."

He further says:

"It (opposite party's contention) amounts to a contention that a subordinate Court is the sole and final judge of the ambit of its own jurisdiction. It is certainly true that the High Court will not interfere in revision with a decision on the merits even if the lower Court should err both in law and in fact, provided always that such subordinate Court had jurisdiction to entertain the dispute between the parties. But if it be contended, as in this case, that the Court had no jurisdiction whatever to entertain the matter, this Court must listen to the contention and if it should find that the lower Court has made a mistake as to the extent of its jurisdiction, it may then interfere and this is particularly so when the lower Court, in determining the ambit of its own jurisdiction, construes a legislative enactment."

This decision in 14 Pat. 488¹⁴ came up for consideration in a Full Bench case of this Court, A.I.R. 1938 Pat. 22.¹⁵ The decision in 14 Pat. 488¹⁴ was accepted as good law and it was held that

"the superior Court will interfere in revision where the jurisdiction is derived from statute e.g., the Court-fees Act, and the matter is one of construction of the statute, e.g., the particular category

15. ('38) 25 A. I. R. 1938 Pat. 22 : 16 Pat. 766 : 172 I. C. 840 (F. B.), *Ramkhelawan Sahu v. Surendra Sahi*.

into which the suit falls and the proper court-fee payable on it. Moreover in deciding the question of court-fee, the Court is deciding an issue as between the Crown and the plaintiff; and should its decision be adverse to the plaintiff, it amounts to a decision to refuse to exercise its jurisdiction to try the issue as between the plaintiff and the defendant."

Applying the principles thus enunciated in the Full Bench case to the facts of the case before us, it comes to this that the learned Subordinate Judge in deciding the question whether the applicant's allegations do not show a cause of action in a particular way resulting in his rejection of the application for permission, decides the question whether the applicant is entitled to sue without payment of proper court-fees, and in doing so, he ultimately refuses to try the issue as between the applicant and the opposite party. His power or jurisdiction to so refuse is attributable to the statutory enactment of R. 5, cl. (d) and if he misinterprets this provision or in holding an inquiry into the applicability or otherwise of this provision of law commits an error of law, he in substance commits a mistake with regard to the ambit of his jurisdiction, and therefore this being a question in which the question of jurisdiction is involved, his order is revisable under S. 115, Civil P. C., by the High Court. Apart from what I have said above, the same conclusion is inevitable from another aspect of the matter. It has to be seen whether in examining the question whether the applicant's allegations do not show a cause of action, within the meaning of R. 5, cl. (d), O. 33, Civil P. C., the Court has got to decide the merits of the case at this preliminary stage. In other words, whether the aforesaid provision requires a Court to examine if the allegations are such as would lead to a successful termination of the suit in favour of the applicant, or he has simply to see whether the allegations show *prima facie* a cause of action calling for a reply from the opposite party and later a final adjudication of the matter as between the parties. The learned counsel for the opposite party contends that the words "cause of action" appearing in R. 5, cl. (d) mean bundle of facts which would enable the plaintiff to succeed in his suit, and in support thereof cites the decision in A.I.R. 1933 Pat. 284.¹⁶ If this decision is the last word on the subject, it no doubt supports the learned counsel's contention. This was a case in which the plaintiff-petitioner was claiming the right of succession to a mahantship of a particular math.

He set out in his plaint that the succession of the particular institution was regulated by a custom of nomination followed by election, while with regard to his own case, he based the cause of action on nomination merely without any election. In such circumstances, the bundle of facts alleged by him did certainly show not only no *prima facie* cause of action but also showed that according to the very rule of succession propounded by him, he could not succeed. Under those circumstances, James J. after laying down the facts and after demonstrating how the plaintiff's title was on the very face of it defective, since on his own allegations in the plaint, he was not a legally constituted mahant of the math, and that on such allegations, he could not hope to succeed in an action for ejection, observed :

"The cause of action may be defined as the bundle of facts which would enable the plaintiff to succeed in his suit; and it must be held in this case that the plaintiff has not set out a cause of action in his plaint."

In that case the Subordinate Judge in allowing the applicant the permission to sue in *forma pauperis* did not confine himself to the case of the plaintiff as set out in the plaint but had made out a new case by travelling outside the plaint, and therefore his Lordship held that his order could not be sustained. It seems that the facts of that case did not warrant the aforesaid definition of the words "cause of action." It seems they had been defined rather more widely than it was necessary for the decision of that case. If this view be correct, then it would not be wrong to say that allegations in a particular suit may amount to cause of action according to the decision of one Court and may not amount to cause of action according to the decision of either a superior Court or inferior Court who gives different decision on it. On the contrary, there are authorities to the effect that what the Court has to decide in adjudicating upon the maintainability of a pauper application is whether the allegations, *prima facie*, show a cause of action capable of enforcement in a Court of justice and calling for an answer. In this connexion I refer to the case in 13 C. L. J. 593.¹⁷ In this the learned vakil who appeared to show cause had argued that the plaint as amended did disclose a cause of action and that it was not open to this Court to determine at that stage whether the plaintiff is or is not entitled to succeed on the basis of the alleged cause of action. In support of his con-

16. ('33) 20 A.I.R. 1933 Pat. 284 : 145 I. C. 307, Ramdhanpuri v. Balkishen Puri.

17. ('11) 11 I. C. 55 : 13 C. L. J. 593, Nawab Bahadur of Murshedabad v. Harish Chandra.

tention he had placed reliance upon the cases in 2 C. W. N. 474¹⁸ and 8 C. W. N. 70.¹⁹ These cases affirmed the proposition that it is not open to a Court at the preliminary stage to enter into the merits of the suit and to determine whether the cause of action alleged in the plaint is or is not well founded. In reference to this, Mookerjee J. said:

"The correctness of this position need not be disputed, though there has been some divergence of judicial opinion upon the question of the extent to which the Court is entitled to investigate the facts at the preliminary stage, with a view to determine whether or not the allegations of the plaintiff disclose any cause of action."

Mookerjee J. referred to the case in 20 ALL. 299²⁰ in which it was said that the learned Judges of the Allahabad High Court were inclined to the view that the Court is authorised by S. 407 of the Code of 1882 which corresponds with R. 5 of O. 33 of the Code of 1908 to deal not merely with the question of jurisdiction but also to determine whether the person who asked for leave to sue in *forma pauperis* has a good subsisting *prima facie* cause of action capable of enforcement in a Court of justice and calling for an answer. In 41 Mad. 620²¹ it has been held by their Lordships of the Madras High Court that upon an application for leave to sue in *forma pauperis*, the Court is not justified in determining, at the stage contemplated by O. 33, R. 5, Civil P. C., a question of limitation as to which there has been considerable difference of judicial opinion. Order 33, R. 5 applies only to cases where the allegations of the petitioner do not show a cause of action and this should appear clearly upon the face of the petition. This view of the Madras High Court has since been approved in the Full Bench case in 10 Rang. 357²² in which Page C. J. holds that it is not the function of the Court to embark at this stage upon the consideration of a complicated or a doubtful question of law or fact arising upon the allegations. In this connection, Page C. J. observes:

"Further, I am of opinion that, if the allegations of the applicant *prima facie* disclose a cause of action, the Court ought not to embark upon the

consideration of a complicated or doubtful question of law or fact that may arise upon the allegations of the applicant for the purpose of determining whether the allegations show a cause of action, for it is contrary to the scheme and the provisions of O. 33 that the Court for the purpose of disposing of an application for leave to sue in *forma pauperis* should decide issues affecting the merits that more properly and fairly can be determined at the hearing of the suit." (Here his Lordship refers to the case in 41 Mad. 620.²¹)

From the very discussion of the question, at issue, whether Gandharva form of marriage is valid according to the Mithila School of Hindu Law embarked upon by the Subordinate Judge in his judgment, as well as on reference to the authorities which I have cited above either in favour or against the question, and the very wrong approach made by the Subordinate Judge in his discussion on the question, it is evident that the question is one of considerable difficulty and doubt, and, therefore, the learned Subordinate Judge was not acting within the ambit of his jurisdiction when he decided the question on the merits and once for all. Here his erroneous interpretation of R. 5 (d) is the basis on which he founds his jurisdiction to reject the pauper application and plaint.

There is still another aspect of the matter from which if judged it will appear that the learned Subordinate Judge has, at any rate, acted in exercise of his jurisdiction with material irregularity. As I have shown above, the limited question whether the plaintiff was entitled to maintenance as against her alleged husband to whom she was married in the Gandharva form was the question at issue and the allegations should have been examined to show whether even for this limited purpose she should not be considered to be the wife of the opposite party. The learned Subordinate Judge has missed this very question, and there is not a word of discussion about it in his judgment though in the operative part of it he rejects the petition holding that the allegations do not show a cause of action. The point had been raised in the plaint. On the contrary, he says that the petitioner's claim to maintenance on the mere fact of marriage though invalid is not tenable in view of her pleadings. This amounts to saying that he refused to bring his mind to bear upon the real question at issue. A similar question arose in I. L. R. (1937) ALL. 805.²³ There, as will appear from

23. ('37) 24 A. I. R. 1937 All. 598 : I.L.R. (1937) All. 805 : 170 I. C. 567 (F.B.), Raghubir Singh v. Mul Chand.

18. ('93) 2 C.W.N. 474, Debo Das v. Ram Charan Das.

19. ('04) 8 C. W. N. 70, Gopal Chandra Neogy v. Bigo Mistry.

20. ('98) 20 All. 299, Ramrakh Nath v. Sundar Nath.

21. ('18) 5 A. I. R. 1918 Mad. 60 : 41 Mad. 620 : 45 I. C. 95, Govindasami Pillai v. Municipal Council, Kumbakonam.

22. ('32) 19 A. I. R. 1932 Rang. 107 : 10 Rang. 357 : 139 I. C. 265 (F.B.), U Ba Dwe v. Maung Du Pan.

the judgment, the lower Court had failed to consider the material question raised in the case and did not apply his mind at all to the provisions of law on that question. In that case the leading judgment was delivered by Sir Sulaiman C. J., who in disposing of the preliminary objection that no revision lay, observed :

"It has been laid down by their Lordships of the Privy Council in several cases that where a lower Court comes to an erroneous view of the law or decides a case erroneously, it does not act with material irregularity in the exercise of its jurisdiction, nor does it act without jurisdiction, and that, therefore the High Court has no power in revision at all. But where there is not merely a question of error of law or an erroneous decision, but there has been a material irregularity in the acting of the Court below while exercising its jurisdiction, it is well settled that a High Court can interfere. In the present case there is not a question of any error of law made by the Court below, but it is a material irregularity in the exercise of jurisdiction, because the Court did not at all apply its mind to the objection raised by the applicant, which had been either conceded or at any rate not disputed on behalf of the decree-holder. The point had certainly been made that interest should be calculated on the principal sum and it does not appear to have been expressly disputed on behalf of the decree-holder. The Court, without any reference to the provision of S. 30 of the Act and the definitions of the words 'loan' and 'interest' as given in the Act, has in the operative portion of its order, but not by its main judgment, directed that the interest should be calculated on the aggregate amount. . . . The Court below without considering the matter has taken it for granted that the decree should be in the form given in the operative portion of the order. It has not given any reasons in support of that direction. The case, therefore, is not merely one of an erroneous decision, but is one in which there has been a material irregularity in the exercise of jurisdiction because there has been no consideration of the point at all."

Applying the principles of this case to the facts of the present case, it is clear that the learned Subordinate Judge has not applied his mind as to what the Hindu law is with regard to the right of maintenance of a wife belonging to Brahmin caste married in a Gandharva form as against her Brahmin husband, while it is a matter of common knowledge that various jural relationships created under circumstances invalidating the same and the provisions of the Hindu law are ultimately found to create a legal relationship for the limited purpose of maintenance. In this view of the matter, it is quite clear that the learned Subordinate Judge has not only not acted within the ambit of his jurisdiction but acted with material irregularity in exercise of his jurisdiction in not considering the real point in controversy. In my view therefore the order of the learned Subordinate Judge must be

set aside and the applicant's petition for leave to sue in *forma pauperis* should be granted. The rule is made absolute and the opposite party must pay the costs to the applicant. Hearing fee five gold mohurs.

Sinha J. — I agree.

G.B./D.H.

Rule made absolute.

[Case No. 113.]

A. I. R. (33) 1946 Patna 330

MANOHAR LALL AND DAS JJ.

Bindhyachal Prasad Varma —

Petitioner

v.

Madho Singh and others —

Opposite Party.

Criminal Ref. No. 8 of 1945 and Cri. Revn. No. 290 of 1945, Decided on 11th October 1945, made by Addl. Dist. Magistrate, Shahabad, D/- 8th February 1945.

(a) Criminal P. C. (1898), S. 145 — Question of misjoinder or non-joinder of parties does not affect Magistrate's jurisdiction.

Two essential conditions for the foundation of jurisdiction of the Magistrate under S. 145 are that there should be a dispute likely to cause a breach of peace and that the dispute should concern land. Questions of whether A ought to have been added as being a person likely to be affected by the proceeding, or B omitted as not being concerned in it, or whether C was added at too late a stage, and such like, are questions of procedure by which the jurisdiction of the Magistrate is not affected : 30 Cal. 155 (F. B.) ; ('26) 13 A. I. R. 1926 Pat. 67 and ('38) 25 A. I. R. 1938 Pat. 1, *Rel. on.* [P 333 C 1, 2]

Cr. P. C. —

('46) Chitaley, S. 145, N. 20, Pt. 4.

(b) Criminal P. C. (1898), S. 145 — Dispute between two parties — Members of one party in possession under one title — Order of Magistrate upholding their possession is not bad merely because he did not consider separate possession of each member.

Where there is a dispute between two parties over some land and the members of one party were in possession under one title and separate possession amongst them was a matter of private arrangement, the order of the Magistrate upholding their possession is not bad merely because he has not considered the separate possession of each particular member of the party or because some members of that party have died during some stage or other of the proceeding : ('37) 24 A. I. R. 1937 Pat. 413, *Disting.* [P 335 C 2]

(c) Criminal P. C. (1898), S. 145 — Material question for decision is question of possession at date of order under sub-s. (1) — Magistrate is bound to uphold possession of party in possession on that date.

In a proceeding under S. 145, the material question for decision is the question of possession at the date of the order under sub-s. (1) of S. 145. The Magistrate is bound to uphold the possession of the party who was in possession on that date. Where one of the parties who claim possession on

the basis of a lease has not admitted that they have given up possession after the expiry of the lease it would be obviously improper to drop proceedings or set aside the order of the Magistrate when the dispute between the parties still subsists, on the ground that the lease is determined by efflux of time. [P 335 C 2]

Cr. P. C. —

('46) Chitaley, S. 145, N. 41.

Mahabir Prasad, G. P. Das, Dasu Sinha and Murtaja Fazl Ali — for Petitioner.

Baldeva Sahay, Harinandan Singh and Angad Ojha — for Opposite Party.

Das J. — These two cases arise out of a proceeding under S. 145, Criminal P. C. The dispute relates to about 230 bighas of land in village Bharsara Mangit within police station Shahpur of the district of Shahabad. The dispute appears to have arisen soon after the death of Lady Jwala Prasad, which event took place on 8th June 1941. The property in dispute belonged to the late Sir Jwala Prasad, a Judge of this Court. After his death on 25th March 1933, there was a dispute between his widow (Lady Jwala Prasad) and his brother Bindhyachal Prasad Varma, the petitioner in Cri. Revn. No. 290 of 1945, and first party in the proceeding before the learned Magistrate. Sir Jwala Prasad left two nephews also, Ramchandra Prasad Varma and Parsuram Prasad Varma, and a grand nephew, Bijoy Pratap Varma. Ramchandra Prasad Varma is concerned in Cri. Ref. No. 8 of 1945. The dispute between Lady Jwala Prasad and the aforesaid members of the family was ultimately referred to the arbitration of two Judges of this Court. The said arbitrators decided the dispute by an award. It is sufficient to state that under the award, the property was given in equal shares to Bindhyachal Prasad Varma and the nephews, with the proviso that during her lifetime, Lady Jwala Prasad would be in possession of, and entitled to, exclusive possession of the immovable property and to be entered in the land registration in respect thereof and receive and appropriate all profits therefrom and

"otherwise to deal with the said property as proprietor having a life-interest only therein, subject nevertheless to personal liability in respect of all the ordinary expenditure of such a proprietor in respect of public demands and other burdens on the property not hereinafter excepted and in respect of the ordinary upkeep of the property and subject to such other conditions and reservations as are hereinafter set out."

Under cl. 6 of the award it was provided that

"if a certificate is issued by the Collector in respect of any arrear of cess or other public demand pay-

able upon any item of immovable property aforesaid by the first party (Lady Jwala Prasad), it is open to either the second or the third party (Bindhyachal Prasad Varma or the nephews) to pay to the Collector the amount due and such party is thereupon entitled to take possession of the said item of property until the first party has repaid to such other party the amount so paid to the Collector with interest at twelve and a half per cent. per annum etc."

The property in dispute in the present case has been described in three schedules. Schedule A consists of about 160 bighas of canal irrigated land said by the first party to be the bakasht of the proprietors. According to the first party, this land came into the possession of the first party on 27th September 1939, on payment by him of canal dues which had been allowed to fall in arrears by Lady Jwala Prasad and in respect of which a certificate had been issued by the Collector. This possession is claimed to have been taken in accordance with para. 6 of the award. Schedule B consists of about 12 bighas of land of which the first party claims to be in possession under a deed of trust executed by Lady Jwala Prasad on 30th September 1936, appointing the first party as trustee. Schedule C consists of about 57 bighas of land which has been referred to in the proceeding as inheritance land. It is said that the first party, Bindhyachal Prasad Varma, and the nephews came into possession of this land on the death of Lady Jwala Prasad on 8th June 1941.

On the other side, the second party to the proceeding under S. 145, Criminal P. C., claimed possession of the lands in dispute under a lease executed by Lady Jwala Prasad on 12th June 1940, in favour of her tahsildar, Madho Singh, and three of his relatives, namely, Sadho Singh, Awadh Singh and Gaya Singh. Besides these four persons, there are others included in the second party, and according to the second party's case, these persons are relatives on whose behalf the settlement was taken by Madho Singh and others, and they were amicably in separate possession of the disputed lands which were acquired by the lease.

The present dispute arose in the following way. Soon after the death of Lady Jwala Prasad in June 1941, there was a report by the chaukidar of an apprehension of a breach of the peace. The local police thereupon submitted a report to the Sub-divisional Magistrate. On this report, a proceeding under S. 144, Criminal P. C., was drawn up. This proceeding appears to have terminated in favour of Bindhyachal Prasad

Varma, and when the matter was brought to the High Court, this Court declined to interfere, as the order under S. 144, Criminal P. C., was likely to expire in a few days. An observation appears to have been made by this Court to the effect that the appropriate section for deciding the question of possession would be S. 145, Criminal P. C. Subsequently, a proceeding under S. 107, Criminal P. C., was drawn up against the second party (Madho Singh and others). Again, the matter came up to the High Court and the proceeding under S. 107, Criminal P. C., was quashed. The decision of Dhavle J. who dealt with the case, is reported in A.I.R. 1942 Pat. 331.¹ After the aforesaid decision, the learned Magistrate drew up a proceeding under S. 145, Criminal P. C., on 14th March 1942. This proceeding was drawn up on the earlier police report, inasmuch as the learned Magistrate was satisfied that an apprehension of a breach of the peace between the parties still continued. This proceeding terminated on 8th January 1943. The learned Magistrate stated that he was unable to satisfy himself as to which of the parties was in possession, and he attached the lands under S. 146, Criminal P. C. I have failed to mention that when a proceeding was drawn up on 14th March 1942, the learned Magistrate had passed an order of attachment pending his decision of the dispute. Against the order attaching the land under S. 146, Criminal P. C., there was a reference to this Court, which was disposed of by Shearer J., in Cri. Ref. No 29 of 1943. The reference was accepted, and the order of the learned Magistrate was set aside. The case was remanded with directions to the learned Magistrate to hear further arguments and then pronounce judgment. The learned Magistrate heard further arguments on 19th September 1943, and then again on 13th February 1944. On 6th April 1944, he passed orders holding the second party (Madho Singh and others) to be in possession of the disputed land except a few plots and he forbade the first party from disturbing the possession of the second party. Against this order, there were again a reference and an application in revision, the reference being Cri. Ref. No. 23 of 1944 and the revision being Cri. Revn. No. 689 of 1944. These were disposed of by Reuben J. by his order dated 22nd September 1944. The application in revision was dismissed, and the reference was accepted in part with regard to some

1. ('42) 29 A. I. R. 1942 Pat. 331 : 200 I. C. 316, Madho Singh v. Emperor.

formal defects, which were directed to be corrected in the order under sub-s. (6) of S. 145, Criminal P. C., which was still to be issued. The matter again went back to the trying Magistrate, who heard the parties on 14th October 1944, and then on 16th December 1944, the Magistrate passed the formal order under sub-s. (6) of S. 145, Criminal P. C. It is against this order, dated 16th December 1944, that the two cases under our present consideration are directed. It would appear from what I have stated above that the present proceeding under S. 145, Criminal P. C., has now been pending for more than three years, and the dispute itself has been pending for more than four years, thereby frustrating to a great extent the very purpose for which the preventive sections of the Code of Criminal Procedure were intended.

It would be convenient to take up the reference and the revision separately, inasmuch as the questions raised are not exactly the same. These cases were originally before a single Judge and have come to us, because it was considered desirable that the uncertainty of the legal position regarding a particular point, which I shall presently mention, should be set at rest by a decision of the Division Bench. The "uncertainty of the legal position," referred to above, arises in Cr. Ref. No. 8 of 1945, and is the following. I have already stated that the first party in the proceeding under S. 145, Criminal P. C., was Bindhyachal Prasad Varma, and the 2nd party were Madho Singh and others. The nephews of Bindhyachal Prasad Varma were not made parties to the proceeding. When the matter came up before Reuben J., one of the points taken before him was that the order of the learned Magistrate was bad, because of non-joinder of the nephews. Reference was made in this connection to the cases in 10 P. L. T. 685²; 10 P. L. T. 689³ and A. I. R. 1938 Pat. 1.⁴ Reuben J., then observed as follows :

"The point is a difficult one, and, in my opinion, it is not necessary to consider it in the present case, because A. I. R. 1938 Pat. 1⁴ is itself an authority that proceedings under S. 145 are not without jurisdiction, and, therefore, void merely because certain persons who might have been impleaded have not been impleaded. In the present case, the nephews have not made an application

2. ('22) 9 A. I. R. 1922 Pat. 210 : 77 I. C. 1005 : 10 P. L. T. 685, Raghunandan Pandey v. Kishin Mohan Singh.

3. ('29) 16 A. I. R. 1929 Pat. 505 : 117 I. C. 643 : 10 P. L. T. 689, Jainath Pati v. Ramlakhan Prasad.

4. ('38) 25 A. I. R. 1938 Pat. 1 : 173 I. C. 107 : 18 P. L. T. 886, Inderdeo Singh v. Kesho Singh.

to be impleaded or to challenge the validity of the proceedings. When they do so, it will be time enough to consider what the effect of not impleading them will be."

When the case went back to the Magistrate for the purpose of removing some of the formal defects as directed by Reuben J., Ramchandra Prasad Varma made an application on 18th October 1944, to be made a party to the proceeding. It is to be noted that this application was filed after the proceeding had terminated in favour of the 2nd party by the decision of the learned Magistrate given on 6th April 1944. All that remained to be done was to issue a formal order under sub-s. (6) of S. 145, Criminal P. C. The application filed by Ramchandra Prasad Varma was rejected by an order of the learned Magistrate in the following terms :

"It is too late now. He was not a party in the proceeding. Babu Bindhyachal Prasad Varma has already claimed to represent him."

Therefore, the question for consideration is if the order of the learned Magistrate is bad for non-joinder of Ramchandra Prasad Varma, one of the nephews of Bindhyachal Prasad Varma. This question has been examined in great detail in A. I. R. 1938 Pat. 1⁴ with reference to the earlier decisions in 10 P. L. T. 685² and 10 P. L. T. 689,³ and it has been held that the two essential conditions for the foundation of jurisdiction of the Magistrate under S. 145 are that there should be a dispute likely to cause a breach of peace and that the dispute should concern land : it is not correct to say that because S. 145 (3) provides for local publication, therefore, the question of possession is set at rest once for all and the final order under S. 145 (6) is binding on the whole world. It is, therefore, open to a Magistrate to start fresh proceedings under S. 145 in respect of the same land, when the parties to the proceeding are not the same as in the previous proceedings. This very question was referred to the Full Bench of the Calcutta High Court in as far back as 1902, and the decision of the Full Bench was given in 30 Cal. 155.⁵ At the time when the said decision was given, orders under S. 145, Criminal P. C., were excepted from the revisional jurisdiction of the High Court, though they were subject to superintendence under S. 107, Government of India Act, 1915. The nature of this latter jurisdiction was among the questions dealt with by a Special Bench to

this Court in 1 Pat. L. J. 336,⁶ where the decision of the Calcutta High Court in 30 Cal. 155,⁵ was referred to with approval. On the question as to how non-joinder affected jurisdiction, Hill J., whose judgment was concurred in by the majority of the Full Bench, observed as follows in 30 Cal. 155⁶ :

"Then as to the question of jurisdiction. On being satisfied of the existence of a dispute likely to cause a breach of the peace concerning land, etc., within his local jurisdiction, the duty, which is imperative, is cast upon the Magistrate of taking action under S. 145. The two essentials are that there should be a dispute likely to cause a breach of the peace, and that the dispute should concern land, etc. The section does not primarily contemplate cases in which there have already been overt acts of violence. All the disputants may be persons of peaceable disposition, but if the dispute is in its nature of such a kind that it is likely, having regard to the known conditions of society, to lead to a breach of the peace, that is enough to warrant the Magistrate's intervention and to give him jurisdiction over the subject of dispute. Upon the existence of those conditions and those conditions only, is the jurisdiction of the Magistrate in my opinion dependent. The object I think, is to take the subject of dispute, so to speak, out of the hands of the disputants, and to constitute one of them, whose possession the law will protect, its custodian until the other has established his right (if any) to possession in a civil Court. In certain instances indeed the Magistrate is authorised himself to take possession so that none of the parties concerned may have possession, until a civil Court has decided upon the right. But be this as it may, questions of the misjoinder or non-joinder of parties do not ordinarily go to the jurisdiction. A Magistrate would no doubt be acting without jurisdiction, if he entered upon his inquiry without having issued the orders contemplated by cl. (1) of the section. But questions of whether A ought to have been added as being a person likely to be affected by the proceeding, or B omitted as not being concerned in it, or whether C was added at too late a stage, and such like, are questions of procedure by which in my opinion, the jurisdiction of the Magistrate is not affected."

It was further pointed out in that case that up to the point of the beginning of the inquiry, the Magistrate has very wide powers with respect to the person whom he will bring into the proceeding; he may alter or add to the array of parties either of his own motion or on the application of any one claiming to be concerned in the dispute in the sense that he claims to be in possession; but after the enquiry has opened, it is not intended, subject to the provisions of cl. (7), that any new parties should be brought in. It would lead to much inconvenience and delay, and it would be necessary in such a case to start the inquiry afresh, as the party added would have a right to have the evidence taken in his presence: if several

5. ('03) 30 Cal. 155 (F. B.), Krishna Kamini v. Abdul Jubbar.

6. ('16) 3 A.I.R. 1916 Pat. 292; 1 Pat. L. J. 336; 35 I.C. 801 (F.B.), Parmeshwar Singh v. Kailashpati.

claimants successively were to come in this way, it is evident that the proceeding might be indefinitely prolonged. This view taken in 30 Cal. 155⁵ was accepted in 7 P.L.T. 156,⁷ where it was observed that the question of misjoinder and non-joinder of parties being a question of procedure did not ordinarily affect jurisdiction. The same view was again expressed in A.I.R. 1938 Pat. 1,⁴ where several earlier decisions on the same question were examined. This view was also approved by a Division Bench in A. I. R. 1939 Pat. 611⁸ where the effect of an order under S. 145, Criminal P. C., came to be considered in an appeal from a conviction of certain persons. It was observed there as follows:

"Though both of us agree in the view taken in this last case, A. I. R. 1938 Pat. 1,⁴ the general principle, which we have enunciated above, remains the same. A third party, not bound by the order in a proceeding under the section, is in a different position from a party who has been definitely prohibited from disturbing the possession of the successful party."

The question of not impleading some co-sharer landlords in a dispute under S. 145, Criminal P. C., was also considered in 1939 P. W. N. 64⁹ and it was observed as follows:

"In the case of cosharer landlords, possession of one is the possession of all, and one set is capable of representing the entire body in a proceeding under S. 145, Criminal P. C."

The decision in 28 Cal. 446¹⁰ was distinguished on the ground that it was a case in which there were different sets of landlords, some of which were not parties to the proceeding. In the case before us, the written statement of Bindhyachal Prasad Varma claimed that he and his nephews were jointly in possession. The statement is "that the petitioner along with his nephews is in possession of all the lands described in Schs. A and C." Whether Bindhyachal Prasad Varma could and did represent the nephews in the present proceeding under S. 145, Criminal P. C., is a question which need not be decided here. No application was filed on behalf of any of the nephews for being added as a party, till after a decision had been given by the learned Magistrate on 6th April 1944. The application was made for the first time by Ramchandra Prasad Varma on 18th October 1944, after the case had gone back to the learned

Magistrate for issuing a formal order under sub-s. (6) of S. 145, Criminal P. C., as directed by Reuben J. In these circumstances, I am unable to accept the contention that the order of the learned Magistrate is bad for non-joinder of Ramchandra Prasad Varma. In my opinion, the view taken in 30 Cal. 155⁵ is still good law, and two single Judges of this Court and a Division Bench have accepted that view as correct. As at present advised, I see no reasons to dissent from that view.

The only other question, which arises in Criminal Reference No. 8 of 1945, is the order supposed to have been given by the learned Magistrate for delivery of possession on 16th December 1944. It is in respect of this order that the learned District Magistrate has made a reference to this Court. It appears from the explanation of the learned Magistrate that no writ of delivery of possession in the ordinary sense was issued: what the learned Magistrate meant was the withdrawal of the attachment by the Court after he had decided the question of possession in favour of the second party. It is admitted that the order of the attachment has now been withdrawn. It is clear to us that no order of attachment can subsist after the learned Magistrate has found in favour of the second party on the question of possession. Therefore, there are no grounds for interference with the order of the learned Magistrate on this account. This disposes of Criminal Ref. No. 8 of 1945. I now turn to Criminal Revn. No. 290 of 1945. The learned Advocate-General for the petitioner has urged before us that the order of the learned Magistrate is bad because some of the members of the second party were dead before the proceedings were drawn up and some more probably died during the proceedings. It was not alleged during the pendency of the proceedings that any of the parties had died; even when the cases were heard by Reuben J. it was not alleged that any of the members of the second party had died. It was during the pendency of the two cases now before us that an allegation was made that some of the members of the second party had died. An affidavit filed by Madho Singh stated that Deshraj Singh and Kedar Singh had died in the year 1942, Mukhi Singh died in 1943 and Suraj Nath Singh in 1944. A counter affidavit was filed on 27th June 1945, on behalf of the petitioner, Bindhyachal Prasad Varma, in which it was stated that Deshraj Singh died on 17th March 1942, Kedar Singh died on 16th Octo-

7. (26) 13 A. I. R. 1926 Pat. 67 : 89 I. C. 151 : 7 P. L. T. 156, Nandansingh v. Siaram Singh.

8. (39) 26 A. I. R. 1939 Pat. 611 : 18 Pat. 544 : 185 I. C. 529, Ambica Thakur v. Emperor.

9. (39) 26 A. I. R. 1939 Pat. 353 : 183 I. C. 286 : 1939 P. W. N. 64, Raja Gope v. Sukan Singh.

10. (01) 28 Cal. 446, Anesh Mollah v. Ejaharuddi Mollah.

ber 1941, Mukhi Singh on 10th November 1941, and Suraj Nath Singh on 13th July 1944. It has been very strongly contended by the learned Advocate-General that the entire proceeding is bad, because an order has been passed by the learned Magistrate upholding the possession of certain dead persons. We are not in a position to decide the question as to the dates on which these persons died, on affidavits only. Moreover, the written statement filed on behalf of Madho Singh and others (second party) clearly shows that the members of the second party were in possession under one title, and separate possession amongst them was a matter of private arrangement. One of the points which was made before Reuben J., and which was sought to be re-agitated before us, is that the order of the learned Magistrate is bad, inasmuch as he has not considered separately the possession of different members of the second party. Reuben J. disposed of this point as follows:

"As I have indicated, the claim of the second party is that they all derived their title to, and their possession over, these lands under the lease executed by Lady Jwala Prasad in the year 1940. The separate possession of the land by different sets of the second party is a matter of private arrangement between themselves. I do not see how the failure of the Magistrate to specify the different portions in his proceedings can have prejudiced the first party."

Reuben J. had disposed of the point, and it is no longer open to the petitioner to raise the same point over again. Our attention was drawn in this connection to the case in 18 P. L. T. 824.¹¹ The facts of that case, however, were different, inasmuch as the tenants in that case claimed under different titles, and there was no unity of title or possession amongst the tenants who were members of the second party. In those circumstances, it was observed that the order of the Magistrate had resulted in the absurdity of passing an order declaring the possession of a person who was dead before the proceeding was drawn up. This case was considered in 1939 P. W. N. 64,⁹ where the distinction mentioned above was pointed out and reference was made to the case in 1938 P. W. N. 149,¹² where Noor J. had pointed out that it was not necessarily illegal or irregular to combine a large number of plots in a proceeding under S. 145, when the dispute between a landlord, who

claims a large number of plots on one side and different sets of tenants, who claim different plots, on the other. Here the members of the second party were claiming as a body under the lease of 1940. In such circumstances, I am unable to accept the contention that the order of the learned Magistrate is bad, because he did not consider the separate possession of each particular member of the second party or because some members of the second party have died during some stage or other of the proceeding.

The learned Advocate-General laid great stress on the fact that the lease, on the basis of which the second party claimed to be in possession, has now expired by efflux of time, the lease being for a period of five years only. He has contended that the petitioner, as landlord, is entitled to take possession of the land now on the expiry of the lease, and an adverse order under S. 145, Criminal P. C., might prevent him from exercising his ordinary right as a landlord. Reliance has been placed on the case in 5 P. L. T. 656,¹³ where it has been observed that the tenant whose right is determined after the expiry of the lease has no right to remain forcibly upon the land and say to his landlord that he will cultivate that land till he is evicted by a civil Court, and that the landlord is entitled to go upon the land and, if necessary, to use force for the purpose of asserting and maintaining his possession. This contention, however, loses sight of the fact that in a proceeding under S. 145, Criminal P. C., the material question for decision is the question of possession at the date of the order under sub.s. (1) of S. 145. Therefore, the material question for decision in the present case was the question of possession in March 1942, when the proceeding under S. 145, Criminal P. C., was drawn up. The Magistrate is bound to uphold the possession of the party who was in possession on that date. It is not admitted by the second party that they have given up possession after the expiry of the lease, and it would be obviously improper to drop proceedings or set aside the order of the Magistrate when the dispute between the parties still subsists.

There are certain other points raised on behalf of the petitioner, which were disposed of by Reuben J., and the petitioner cannot be allowed to re-agitate them now. With

11. ('37) 24 A.I.R. 1937 Pat. 413 : 170 I. C. 90 : 18 P. L. T. 824, Ram Kishun Singh v. Faujdar Gope.

12. ('38) 25 A.I.R. 1938 Pat. 511 : 178 I. C. 333 : 1938 P.W.N. 149, Gulab Kuer v. Ganouri Koeri.

13. ('25) 12 A. I. R. 1925 Pat. 17 : 81 I. C. 535 : 5 P. L. T. 656, Gita Prasad Singh v. Emperor.

regard to the formal defects, which Reuben J. had directed to be corrected, the learned Magistrate appears to have corrected them in his formal order, dated 16th December 1944, except with regard to two particulars which I shall presently mention. With regard to those plots, which were not claimed in their entirety by the second party, the learned Magistrate has now specified the portion which the second party claim, instead of merely stating "disputed land" as he had done before. With regard to some of the plots, it appears that the first party claimed a particular half either western, eastern, southern and northern, whereas the second party claimed from a different direction. It has been contended before us that only the overlapping portion will be the disputed portion, and not the entire half. The learned Magistrate has, however, specified the particular half which the second party claim, and in respect of which the learned Magistrate has found the second party to be in possession. I am unable to see how any prejudice has been caused to the first party by such specification. The matter has now been made clear by the learned Magistrate, and there is no difficulty in finding out the particular portion in respect of which the possession of the second party has been upheld.

I now mention the two particulars, in respect of which the defects still exist. There are four plots, Nos. 277, 148, 590 and 351, which were not claimed by the second party; yet they have been given to the second party. Learned counsel for the second party has stated before us that these four plots were not claimed by the second party. Therefore, the order of the learned Magistrate with regard to these four plots must be set aside. As these four plots were not claimed by the second party, they cannot be held to be in possession thereof. Then there are seven plots, Nos. 534, 219, 135, 137, 568, 578 and 579, which it is stated, were not included in the proceeding, but in respect of which an order has been passed by the learned Magistrate in favour of the second party. Learned counsel for the second party has pointed out that two of these plots, namely, Nos. 534 and 579, are included in the proceeding. Therefore, the learned Magistrate has made no mistake regarding these two plots. The remaining five plots, namely, Nos. 219, 135, 137, 568 and 578, were not included in the proceeding: this has been conceded by the learned counsel for the second party. Therefore, the learned Magistrate could make no order regarding these five plots.

The net result, therefore, is that the reference is discharged, and the application in revision is dismissed, subject to the modifications mentioned above. The order of the learned Magistrate will stand except with regard to the four plots mentioned above, which were not claimed by the second party, and the five plots not included in the proceeding. The order of the learned Magistrate will be set aside regarding these nine plots.

Manohar Lall J.—I entirely agree.

D.S./D.H.

Order accordingly.

[*Case No. 114.*]

A. I. R. (33) 1946 Patna 336

FAZL ALI C. J. AND PANDE J.

Jankidas Marwari — Petitioner

v.

*Governor-General of India in Council,
New Delhi and another —*

Opposite Party.

Civil Revn. No. 296 of 1944, Decided on 11th December 1945, from order of Small Cause Court, Raghunathpur, D/- 26th January 1944.

(a) Railways Act (1890), S. 72 — Risk Note Form A—Misconduct of railway administration —Proof of.

When both the parties have entered into evidence the question of onus of proof is not very material and the Court has to draw its conclusion from the evidence and attendant circumstances. In the circumstances of transshipment of goods through railway it is well nigh impossible for a consignee to establish categorically as to how and when exactly or by which servant of the railway administration misconduct was committed resulting in the loss of goods. [P 337 C 2]

(On the evidence and attendant circumstances of the case, held that the loss of the portion of the goods arose from the misconduct of the servants of the railway administration in charge of the goods.)

(b) Railways Act (1890), S. 80 — Goods consigned at railway of one administration and delivered at railway of another administration — Their liability for loss of goods is joint and several.

Where goods are consigned at the railway of one administration and are carried over and delivered at the railway of another administration both the administrations are jointly and severally liable. Therefore the former is equally liable to make good the loss by payment of compensation to the same extent as the latter. [P 338 C 2]

S. C. Mazumdar — for Petitioner.

S. N. Bose and N. C. Ghosh —

for Opposite Party.

Pande J.—This is a petition against the order dated 26th January 1944, of the Small Cause Court Judge of Raghunathpore, in the district of Manbhum, dismissing the petitioner's claim for compensation for the loss of a portion of the article consigned by him through railways. It appears that on

2nd December 1942, the petitioner consigned 14 mds. 11 srs. betelnuts in ten bags at the Howra East Indian Railway Station for delivery at the Jaichand Pahar Railway Station on the Bengal Nagpore Railway line. The consignment of the said quantity of article and its shortage at the delivery by 24 seers are not in dispute. The only point of difference between the parties is regarding the opposite parties' liability to compensate for the loss. It has been proved that the consignment of the article was under Risk Note Form A under S. 72 (2) (b), Railways Act, 9 [IX] of 1890. Section 72 provides:

"72. (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under Ss. 151, 152 and 161, Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and (b) is otherwise in a form approved by the (Federal Railway Authority)

By the terms of the agreement in Risk Note Form A the railway administration are exonerated from all responsibilities

"for the condition in which the goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants."

Therefore the only point that arises for consideration is whether in the particular case the shortage at the delivery of the goods consigned arose from misconduct on the part of the Railway Administration's servants. The article in question was carried by the East Indian Railway up to Asansole Railway Station where it was made over to the Bengal Nagpore Railway Administration for carriage to the destination, Jaichand Pahar Railway Station. In the written statement on behalf of Bengal Nagpore Railway Company it is stated that the consignment was received by them "in good condition." The Transhipment Clerk (D. W. 3) also deposed to the same effect. The Transhipment Clerk further stated that the goods had been transhipped at Asansole in good condition. It is stated that Jaichand Pahar Station is twenty-five miles only from Asansole. At the station of destination one of the bags was found partly torn and on weighing there was a shortage of 24 seers in the goods delivered. There is nothing to show that any part of the goods lost was found scattered about in the carriage in which it

was transhipped from Asansole to Jaichand Pahar. In the Goods Tally Book of Jaichand Pahar Station there is a note "One bag M/19 in torn condition, contents falling out, not reweighed due to no scale in yard." This note appears to have been made in the book by the Assistant Station Master of that Station. He stated that he received such a note from the Guard in charge. But no such note of the Guard was produced by the defendants, nor was the Guard examined. There appears to be no explanation for not examining the Guard though a number of other clerks were examined on behalf of the defendants. In these circumstances it is contended by the learned advocate for the petitioner that the obvious inference is that the loss in question arose from misconduct on the part of the Railway Administration's servants. The learned Small Cause Court Judge, however, refused to draw such inference from the above circumstances mainly for the reason that the petitioner had failed to prove "as to how and when exactly the tearing in that particular bag was caused." The learned Small Cause Court Judge appears to have taken the view that the burden of proof being on the petitioner it was necessary for him to establish affirmatively misconduct on the part of the Railway administration. When both parties have entered into evidence, the question of onus of proof is not very material and the Court has to draw its conclusion from the evidence and attendant circumstances. In the circumstance of transhipment of goods through railway it is well nigh impossible for a consignee to establish categorically as to how and when exactly or by which servant of the railway administration misconduct was committed resulting in the loss of goods.

In the present case, it seems to me, the circumstances, as established, reasonably lead to the inference that the loss of a portion of the goods in question arose from misconduct of the servants of the railway administration in charge of the goods from Asansole to the station of destination. Our attention has been drawn to a note at the bottom of the "receipt" (Ex. A-1) and the "record" attached to the goods in consignment note (Exs. E and E-1). The note is not clearly decipherable. The receipt clerk who issued the invoice has stated that the said note in the invoice is "old single gunny stitches weak liable to driage." The learned Small Cause Court Judge could not read so much in the said note and he could decipher only the words "old single gunny." There

are some more words but it is difficult to decipher them even with the help of magnifying glass. The learned advocate for the opposite party referring to the said note contended that the shortage in the goods at the station was due to the defective packing of the article consigned in old bag and so one of the bags got torn in transit and a portion of the article was lost. It is argued that in such circumstance it cannot reasonably be inferred that shortage of goods arose from misconduct of railway administration's servants. There would have been much force in this contention even if a portion of the lost goods would have been found scattered about in the carriage and collected at the station of delivery in the short distance transit from Asansole to Jaichand Pahar station. But there is no evidence to the effect that any part of the article that is said to have come out of the bag which is said to have got torn in the course of transit was collected at the station. The question naturally arises what became of those goods that came out of the torn bag. In the absence of reasonable explanation there can be only one answer to this question that it was taken away by the railway administration's servants in charge of the goods or lost through their gross negligence. Therefore it must be held that the loss of the goods arose from misconduct of the railway administration's servants. The learned Small Cause Court Judge appears to have fallen into an error in drawing inference from the well-established facts and circumstances by laying too much stress upon the burden of proof upon the petitioner who claimed compensation for the loss.

Another point that has been urged is that the relief, if any, to which the petitioner may be entitled would be against the railway administration of the Benal Nagpore Railway which has since gone into liquidation and the claim for damage should have been made against the liquidator and defendant 1 who has taken over management of that railway cannot be liable for loss of goods that occurred before Bengal Nagpur Railway Administration was taken over by them. But the provisions in S. 80, Railways Act clearly furnish an answer to this contention. That section provides:

"Notwithstanding anything in any agreement purporting to limit the liability of railway administration with respect to traffic while on the railway of another administration, a suit for compensation, for loss of the life of . . . or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked

over the railways of two or more railway administration may be brought either against the railway administration . . . to which the animals or goods were delivered by the consignor thereof, as the case may be, or against railway administration on whose railway the loss, injury, destruction or deterioration occurred."

In the present case the goods were consigned at the railway of defendant 1 and were carried over and delivered at the railway of defendant 2. Therefore both the defendants are jointly and severally liable. Therefore defendant 1 is equally liable to make good the loss by payment of compensation to the same extent as defendant 2. Therefore, in my opinion, this contention must fail. I would accordingly allow the petition, set aside the order of the Court below and decree the suit for payment of the compensation as claimed. The petitioner will get costs of this Court as well as of the Court below. Hearing fee assessed at one gold mohur.

Fazl Ali C. J.—I agree.

N.S./D.H.

Petition allowed.

[Case No. 115.]

A. I. R. (33) 1946 Patna 338

MANOHAR LALL AND SINHA JJ.

Firm Pirthiraj Ganesh Das —

Appellant

v.

Kishun Lal and others — Respondents.

Appeal No. 1126 of 1944, Decided on 11th December 1945, from appellate decree of Additional Judicial Commissioner, Chota Nagpur, D/- 24th June 1944.

(a) Hindu law — Debts — Father — Liability of sons to pay debts of father — When can father be said to have been sued in his representative capacity — Decree obtained against father in respect of debt — Sons can challenge by separate suit nature and factum of debt — If debt is not established, sons' interest in ancestral property is not affected by decree.

Once it is proved that there is a debt owing from the father, the only ground on which the sons can escape liability for payment would be that the debt had been incurred for illegal or immoral purposes. Hence, where the creditor recovers judgment against the father alone, that judgment can be enforced even against the interest of the sons or grandsons unless they discharge the heavy onus which lies upon them to prove that the debt in question was tainted with illegality or immorality. But this liability of the sons is based on the doctrine of Hindu law which enjoins it as the "pious obligation" of the sons to pay their father's debt so as to avoid his being thrown into hell. It cannot, however, be said that simply because a judgment had been recovered against the father for payment of money the sons are bound by that judgment in the sense that the father fully represented them for all purposes. The father can be held to have been sued in his representative capa-

city only where it can be shown that the transaction was entered into by him as the leading member of the family, that is to say, where it can be shown that the transaction was for the benefit of the family or for the legal necessity of the family as a whole. Simply because he was the father of the family, and he was sued by a creditor cannot necessarily lead to the inference that the father had been sued in his representative capacity. In other words, the father's representative capacity would be ascribed only to such transactions as could be justified with reference to the benefits and the needs of the family. Hence, on first principle it cannot be held that in every case where the father is sued in respect of an alleged debt, and he suffers a judgment to be given against him, he has acted in his representative capacity. In order to compel the sons to pay their father's debt, it must be found that there was a debt owing from the father and simply because the father suffered a judgment against himself on an alleged transaction of loan cannot prevent the sons from having the factum of the debt investigated in their presence. Hence where a decree had been obtained against the father alone in respect of a debt it is open to the sons to challenge in a separate suit not only the nature but also the factum of the debt alleged to have been the foundation of a decree. If in such a suit it is established that the father did not in fact owe the debt, the decree against the father will not affect the sons' interest in the ancestral property: *Case law reviewed.*

[P 341 C 2 ; P 342 C 1 ; P 343 C 2; P 346 C 2]
Hindu Law —

('40) Mulla, Page 346, S. 294A. (See Pt. K).

('38) Mayne, Page 431, S. 334 (5), Pt. (m).

(b) Civil P. C. (1908), O. 41, R. 2 — Ground that finding of lower Court is not based on evidence, if not taken in memorandum cannot be urged at hearing.

It is not open to the appellant to contend at the hearing of the appeal that the finding of the lower Court was not based on legal evidence, specially when no such ground was taken in the memorandum of appeal. [P 341 C 2]

C. P. C. —

('44) Chitaley, O. 41, R. 2, N. 3, Pt. 1.

('41) Mulla, Page 1156, Pt. (a) 1.

P. R. Das and N. N. Sen — for Appellant.

S. C. Mazumdar and M. Rahman —

for Respondents.

Sinha J. — This is a second appeal on behalf of defendant 1 from the decision of the learned Additional Judicial Commissioner of Chota Nagpur, reversing that of the Subordinate Judge of Ranchi, in a suit for a declaration that the purchase made by the appellant in Execution Case No. 61 of 1934 did not confer any title on him in respect of the properties contained in Sch. 'C' of the plaint, and did not affect the right, title and interest of the plaintiffs.

In so far as it is necessary to state the facts of the case, they are as follows: one Bhani Ram had four sons Lachhminarain, Sheonarain, Ganpat and Balmakund. The plaintiffs-respondents are the son's sons of

Balmakund as also his grand-daughter. Defendant-appellant 1 in this Court is a firm carrying on business in Calcutta. Defendant 2 is a firm called Ganpatrai Balabux (Balabux being the son of Ganpat). Ganpat's three sons are defendants 3, 4 and 5. Balmakund was impleaded as defendant 6. The plaintiff alleged that there was a suit for partition being Suit No. 385 of 1913 in the Court of the Subordinate Judge of Ranchi. The plaintiff in that suit was Balmakund aforesaid. He claimed one-third share in all the joint family properties including a certain firm carrying on business on behalf of the alleged joint family of the parties to that suit; that the sons of Ganpat started a new business under the style of Ganpatrai Balabux (defendant 2); that the plaintiff in that suit (defendant 6 in the present suit) claimed a share of the assets of the firm aforesaid though as a matter of fact that firm was not a joint family business nor was defendant 6 a partner of the firm even in his individual capacity; that in order to deprive defendant 6 of his just share in the admitted joint family properties defendant 1 entered into a conspiracy with defendants 3 to 5 to obtain a false credit against the said firm defendant 2; that in pursuance of that conspiracy they got up a promissory note for Rs. 28,450 in favour of defendant 1 purporting to have been executed by defendant 4 (son of Ganpat) as a partner of the firm defendant 2 on 21st October 1925; that defendant 1 instituted a false suit on the basis of the fictitious debt on the original side of the Calcutta High Court in January 1926 i.e. to say, only a few months after the alleged execution of the hand note. An ex parte decree was obtained in June 1926 against the said firm for Rs. 28,000. It is further alleged that defendant 6 coming to know of the collusive suit and ex parte decree aforesaid, instituted a suit for setting aside that ex parte decree. That suit (No. 1958 of 1931) on the original side of the Calcutta High Court, was ultimately dismissed for non-prosecution in June 1933. Balmakund's application for restoration of the suit also stood dismissed in November of the same year. Soon after in January 1934 the decree-holder defendant 1 applied for leave to execute the decree against Balmakund under the provision of R. 50 of O. 21, Civil P. C. In May 1934 the leave asked for was granted. Balmakund again in order to avoid execution against him applied for setting aside the order of the Calcutta High Court granting the leave

aforesaid. That application stood dismissed in January 1935. In the meantime, defendant 1 took out execution in Ranchi Court, being execution case No. 61 of 1934. In that execution, the decree-holder got all the properties obtained by Balmakund as a result of the partition suit aforesaid, attached and ultimately sold in September 1936. When the decree-holder applied for delivery of possession of the property in December 1938, the present suit was commenced by the plaintiffs respondents for the reliefs aforesaid. In short, the plaintiff's case was, that the entire proceedings ending with the sale of the properties of defendant 6 as aforesaid, were collusive and fraudulent as a result of a conspiracy between the sons of Ganpat on the one hand, and their relations on the other, namely, the members of the firm, defendant 1. The plaintiffs, therefore, claimed that they were entitled to a declaration that their portion of the properties allotted as a result of the final decree in the partition suit of 1913 was not affected by the sale, as also for a permanent injunction restraining defendant 1 from proceeding against those properties.

Defendant 1 alone appeared and contested the suit chiefly on the ground that the decree obtained by the defendant firm against Balmakund was a good decree binding not only upon Balmakund himself but upon the plaintiffs also who were fully represented in the suit, which resulted in the decree and in the execution proceedings, by their ancestor defendant 6. The contention further was that the decree was not tainted with illegality or immorality of which there was no allegation in the plaint and therefore it was the pious obligation of the plaintiffs to pay that judgment-debt. They also claimed that the sale of the properties in execution of the decree in question was effective to convey title to the contesting defendant as against not only Balmakund but the plaintiff also. It was further contended that the firm Ganpatrai Balabux was a continuation of the business originally carried on by the family of Ganpat and Balmakund in the name and style of Ganpatrai Lachhmi Narain. The defendant also denied the allegation in the plaint regarding any conspiracy between the defendants aforesaid. It was lastly contended that the debt resulting in the decree aforesaid was binding on Balmakund and his descendants including the plaintiffs, and that therefore the suit was not maintainable, and the plaintiffs not entitled to any relief.

The trial Court dismissed the suit holding that it was too late in the day to contend that the decree against the firm defendant 2 did not bind Balmakund or the plaintiffs. He held that the plaintiffs were fully represented by Balmakund in that litigation which ended in the sale of the properties in execution. On appeal by the plaintiffs the lower appellate Court has come to the conclusion that the ex parte decree against the firm defendant 2 passed by the Calcutta High Court could not be said to have been passed against Balmakund in his representative capacity; that the firm defendant 2 was not a firm of Balmakund and his collaterals; that the circumstantial evidence in the case made out the plaintiffs' case of collusion between defendant 1 and the other defendants, that is to say, the firm and the sons of Ganpat. The findings of the lower appellate Court, therefore, amount to holding that defendant 6 was not a partner of the firm defendant 2, and that the debt on the basis of which the appellant recovered judgment against the firm was a fictitious one, and that the suit and the execution proceedings were equally void on account of the fraud and collusion. In that view of the matter, the lower appellate Court decreed the suit with costs declaring the plaintiffs' title to the properties claimed by them and restraining defendant 1 from taking possession of the same. Hence this second appeal by defendant 1.

Mr. P. R. Das has vehemently argued that the judgment and decree passed by the lower appellate Court are vitiated by the mistake of law in so far as the Court has gone behind the decree passed by the Calcutta High Court against Balmakund defendant 6. His contention is that the judgment and decree passed by the Calcutta High Court against Balmakund is conclusive not only against him but against the plaintiffs in so far as the factum of the debt is concerned. In this connection reliance was placed upon the following observations of Mayne in his *Treatise on Hindu Law*, Edn. 7, Art. 350 at page 463:

" Where the decree is against a father it conclusively establishes that there was a debt due by him, and as against his issues, unless the debt founded on immorality, nothing more is necessary Where property is sold under such a decree, the purchaser is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it." Mayne appears to have relied upon the decisions of their Lordships of the Judicial

Committee in 1 I.A. 321¹ at p. 334 and 15 I. A. 99.² Mr. Das has relied upon the observations to a similar effect at p. 346 of Mulla's Hindu Law as also upon Mayne's Hindu Law, 10th Edn., at p. 431 to the following effect:

"... or when in execution of a decree for money or on a mortgage by the father, the ancestral property is sold, the sons, not being parties, are entitled to have the nature of the debts tried in a suit of their own."

Mr. Das further relied upon the foot-note apparently added by the Editor of this edition (10th Edn.) at pages 431 and 432, which runs as follows:

"Some of the dicta of the Privy Council and of the Courts in India would entitle the son to dispute the fact of the debt also. 13 I. A. 1 at p. 18 = 13 Cal. 21,³ 21 Mad. 222⁴ at p. 226, 34 Cal. 735⁵ at p. 742. It is fairly clear from the more recent decisions that in a suit upon a debt against the father, he represents the sons when they are not made parties so far as the factum of the debt is concerned and the judgment against the father itself creates the debt. Fraud or collusion, of course, will always be an exception. When a decree is passed against the father for a debt proved against him, it is not easy to see how the sons can dispute the father's liability under it except of course in respect of the nature of the debt regarding which the father could not represent the sons. 16 Mad. 99,⁶ 24 Bom. 343,⁷ 27 Mad. 243⁸ at p. 252, 27 All. 16,⁹ 37 All. 214,¹⁰ 44 All. 649,¹¹ 47 All. 421¹² and 33 Cal. 676.¹³

According to Mr. Das, the fact that a judgment has been given against the father in respect of an alleged debt owing from him binds the sons or grandsons who are not impleaded in the suit, and is conclusive against them on the question of the factum of the debt. His contention further is that the sons or grandsons of the judgment-debtor could only prove in a suit of their own that the judgment-debt was tainted with illegality or immorality, and that because in this case

there was no allegation that the debt was so tainted, it must be held that the plaintiffs had no cause of action for the suit. Hence, the only question in controversy between the parties in this appeal is whether it was open to the plaintiffs to prove that in spite of the judgment of the Calcutta High Court against the firm defendant 2, which must be deemed to be a decree against Balmakund defendant 6 also there was no debt owing from defendant 6, the payment of which could be enforced against the coparcenary properties. If the legal position has been correctly stated by Mr. Das that it is not open to the plaintiffs to prove that there was no debt, it must be held that the plaintiffs have no cause of action for the suit. If, on the other hand, the correct legal position is that the issue of Balmakund could go behind the decree which is binding at least upon Balmakund himself, the finding of the lower appellate Court, which is clear to the effect that Balmakund owed no debt to defendant 1, the appellant, must be upheld as correct in law. This finding was attempted to be challenged by Mr. N. N. Sen who addressed us in reply to the arguments placed before us on behalf of the plaintiffs-respondents. Mr. Sen contended that the finding aforesaid, of the lower appellate Court was not based on legal evidence, but, in my opinion, this ground is not open to the appellant at this stage specially because no such ground was taken in the memorandum of appeal, namely, that there was no evidence in support of the finding aforesaid, of the lower appellate Court. This case must, therefore, be decided on the footing that there is a finding of fact arrived at by the lower appellate Court that there was no debt owing from Balmakund which could be enforced against the coparcenary properties in which the plaintiffs are admittedly interested. Mr. Das's argument in the form presented by him is certainly very attractive, but, in my opinion, as will presently appear on a consideration of the authorities, not sound in law.

It is now settled beyond any controversy that it is incumbent upon the sons to pay their father's debts even though they may not be incurred for the legal necessity of the joint family or for the benefit of the estate. Hence, once it is proved that there is a debt owing from the father, the only ground on which the sons could escape liability for payment would be that the debt had been incurred for illegal or immoral purposes. Hence, where the creditor recovers judgment

1. ('75) 14 Beng. L. R. 187 : 1 I. A. 321 : 3 Sar. 380 (P.C.), Muddun Thakoor v. Kantoo Lall.
2. ('88) 15 Cal. 717 : 15 I. A. 99:5 Sar. 186 (P.C.), Bhagbut Pershad v. Mt. Girja Koer.
3. ('86) 13 Cal. 21 : 13 I. A. 1 : 4 Sar. 682 (P.C.), Nanomi Babuasin v. Modum Mohun.
4. ('98) 21 Mad. 222, Ramasamayyan v. Viraswami.
5. ('07) 34 Cal. 735, Kishun Pershad v. Tipan Pershad.
6. ('93) 16 Mad. 99, Natesayyan v. Ponnusami.
7. (1900) 24 Bom. 343, Joharmal v. Eknath.
8. ('04) 27 Mad. 243 (F.B.), Periaswami v. Seetharama.
9. ('05) 27 All. 16 (F.B.), Karansingh v. Bhup Singh.
10. ('15) 2 A.I.R. 1915 All. 126 : 37 All. 214 : 28 I. C. 593, Inder Pal v. Imperial Bank, Ltd.
11. ('22) 9 A.I.R. 1922 All. 310 : 44 All. 649 : 69 I. C. 754, Mohan Lal v. Balaprashad.
12. ('25) 12 A.I.R. 1925 All. 327 : 47 All. 421 : 86 I. C. 837, Abdul Karim v. Ram Kishore.
13. ('06) 33 Cal. 676, Chander Pershad v. Sham Koer.

against the father alone, that judgment can be enforced even against the interests of the sons or grandsons unless they discharge the heavy onus which lies upon them to prove that the debt in question was tainted with illegality or immorality. But this liability of the sons is based on the doctrine of Hindu law which enjoins it as the 'pious obligation' of the sons to pay their father's debt so as to avoid his being thrown into hell. But it cannot be said that simply because a judgment had been recovered against the father for payment of money the sons are bound by that judgment in the sense that the father fully represented them for all purposes. If that were so, many a designing professional money-lender could recover judgment against a foolish and negligent father by questionable methods, and enforce that judgment against his sons, who will be left helpless in the matter except where they can prove the illegality or immorality of the debt, which is not an easy matter. In any case, it may be easier for the sons to allege and prove that there was no debt than to prove that the debt had been incurred and the money thus borrowed spent upon illegal or immoral pursuits. The decisions, relied upon by Mr. Das, all appear to have proceeded on the assumption that there was a debt owing from the father and only the nature of the debt had to be investigated. The father could be held to have been sued in his representative capacity only where it could be shown that the transaction was entered into by him as the leading member of the family, that is to say, where it could be shown that the transaction was for the benefit of the family or for the legal necessity of the family as a whole. Simply because he was the father of the family, and he was sued by a creditor cannot necessarily lead to the inference that the father had been sued in his representative capacity. In other words, the father's representative capacity would be ascribed only to such transactions as could be justified with reference to the benefits and the needs of the family. Hence, on first principle, it cannot be held that in every case where the father is sued in respect of an alleged debt, and he suffers a judgment to be given against him, he has acted in his representative capacity. Now, let us see if there is precedent in favour of the contention that a judgment given against the father in respect of an alleged debt is conclusive not only against him but against his issue also. The observations in Mulla's Edn. 7, referred to above, appear to have been based

upon the decisions of their Lordships of the Judicial Committee in 1 I.A. 321¹ and 15 I.A. 99.² Let us see if those cases are authority for the proposition contended for on behalf of the appellant. In those cases before their Lordships, the facts were that ancestral property had passed out of the family either by virtue of a sale-deed executed by the father or as a result of a sale held in execution of a decree against the father alone; and the sons sued to recover their shares of the ancestral property. Their Lordships held that it had not been proved that those debts, which ultimately led to the sale, were either immoral or illegal. Hence, they enforced the pious obligation of the sons to pay their father's debt. In none of those cases was it alleged that no debt had been really owing from the father. The allegations of the sons in each case challenging the transaction amounted to averring that the father had acted extravagantly or immorally in incurring those debts. Hence, in each of those cases, the Court decided on the footing that there was a debt owing from the father, the payment of which was incumbent upon the sons. The following observations of their Lordships indicate the basis for the decision in 1 I. A. 321¹ at pages 331 and 332 :

" The bond had been substantiated in a Court of justice; there was nothing to shew that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion either that the bond or the decree was obtained benamess for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved."

The following observations of Bhashyam Ayyangar J. in 27 Mad. 243⁸ at pages 251 and 252 have been very strongly relied upon by Mr. Das in support of his contentions.

"In cases, therefore, where a decree for money has been obtained against the father, but he dies before execution of the same, the creditor has besides executing the same against the son as legal representative, the option of suing the son either on the original cause of action—if it be one in respect of which the son as such would be liable—or to enforce payment of the decree amount as a debt of record due by the father. In the former case the judgment against the father cannot be relied upon by the creditor as binding the son and he must prove and establish the cause of action or the alleged debt just as if no such suit had been brought against the father and judgment obtained. In the latter case, the judgment as such would not bind the son and it will be admissible only to prove the existence of a judgment debt due by the father at the date of the judgment; and the only defences open to the son will be either that the decree-debt is not one which is binding upon him—as being illegal or immoral under the Hindu law—or that the same has been discharged whether such dis-

charge (by payment or adjustment) has been recorded as certified (*vide* S. 258, Civil P. C.), or not."

On reference to the facts of that case it will appear that those observations, weighty as they are in the nature of obiter dicta. No such question, as has been raised in the present case, was mooted in that case. It will appear that a judgment had been obtained against the father but execution of the decree was refused against the joint family property. Thereupon, a second suit was instituted against the whole family including the sons after the father's death. Upon the second suit, the main question in controversy between the parties was whether the second suit was in time and maintainable. Hence, in my opinion, it cannot be said that the point, directly arising for decision in the present case, was at all present in the mind of the learned Judge who decided that case. Mr. Das also relied upon the decisions of the Allahabad High Court in 27 ALL. 16.⁹ Full Bench, 37 ALL. 214,¹⁰ 44 ALL. 649¹¹ and 47 ALL. 421;¹² and of the Calcutta High Court in 33 Cal. 676.¹³ All these cases have been referred to in the foot-note in Mayne's book, 10th Edn. quoted above. But it will be observed that in none of those cases the exact question in controversy in this case was raised for the determination of the Court. In all those cases the existence of a debt owing from the father had not only been found in a suit against the father but had not been challenged by the sons. Hence, the only question in controversy in those cases was whether the sons could escape liability for payment of their father's judgment debt in a suit to which they were not parties. Naturally, therefore, the Court in each case decided that the sons could escape liability only if they established that the debt in question was tainted with illegality or immorality. Mr. Das also relied upon a recent decision of a Division Bench of the Lahore High Court in A. I. R. 1945 Lah. 13.¹⁴ On reference to that decision it will be found that that case came before the High Court on the question of court fees. Their Lordships had to decide whether the sons were entitled to ignore a mortgage decree passed against their father and thus to claim only a declaratory relief. It was contended on behalf of the Revenue that the suit really came under the provisions of S. 7 (iv) (c), Court-fees Act inasmuch as the sons were bound to avoid the decree. Mahajan J., who

delivered judgment of the Court, observed in the course of his judgment, that it was a well-established proposition of Hindu law that a decree against the father is a good decree against the son though the latter has a special remedy for setting aside the decree on a few special defences open to him. He observed further that such defences were open to the sons as were not open to the father himself, and that in other matters the father effectively represented the whole family. Hence, in that case also, the exact question to be determined in the present case did not arise, and, therefore, those observations of their Lordships of the Lahore High Court must be read in the context in which they were made. These are all the authorities which have been relied upon by Mr. Das on behalf of the appellant, for his contention that it was not open to the sons to question the factum of the debt itself in the face of the judgment given against their father. I have already pointed out that none of those decisions render any assistance to the appellant. The observations, either of Mayne himself or of the subsequent editors of his Book, having been based on those decisions, are clearly not authority for the proposition contended for.

On the other hand, as will presently appear, there are decisions of the different High Courts in India clearly recognising the right of the sons in a suit of their own to show not only that the debt which resulted in a decree against the father was tainted with illegality or immorality but also that there was no such debt as could have formed the basis of a decision against the father for payment of a debt binding on the sons also. On first principle, as already observed, in order to compel the sons to pay their father's debt, it must be found that there was a debt owing from the father, and simply because the father suffered a judgment against himself on an alleged transaction of loan could not prevent the sons from having the factum of the debt investigated in their presence.

Their Lordships of the Judicial Committee of the Privy Council have made the following observations, which have almost become classical, in the course of their judgment in 13 I. A. 1³ at pp. 17 and 18 :

" Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality."

14. ('45) 32 A. I. R. 1945 Lah. 13 : 218 I. C. 57, Prithvi Raj v. D. C. Ralli.

Mr. Das lays stress on the concluding clause of the sentence suggesting thereby that their Lordships intended to lay down that the sons could escape liability only if they succeeded in proving that the debt in question was tainted with immorality. But the following observations in the course of the judgment are more pertinent to the present discussion:

" If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit or their own."

From these observations of their Lordships, *obiter dicta* as they are, it will appear that the sons are not precluded from having the factum of the debt in question tried in a suit of their own. In the beginning of the paragraph, where the observations quoted above are found, their Lordships have made it clear that that question did not arise in the case before their Lordships. They observed :

"The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious."

These observations also make it clear that there may be cases where the sons would be entitled in a suit of their own to establish a case that the debt in question resulting in a decree against the father "was merely illusory and fictitious." In 15 I. A. 99,² their Lordships had to decide the question as to whether in a decree against the father alone the entire joint family estate is liable to be sold, and the circumstances in which the sons could escape liability under that decree. In the course of the judgment, their Lordships make the following observations :

" It appears, therefore, from the decisions, that in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to shew that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity."

I have already observed that these two cases before their Lordships of the Judicial Committee were not cases in which the exact question arising in the present case was at all discussed. Hence, though the observations of their Lordships in 13 I. A. 1,³ may tend

to support the contention on behalf of the respondents, it cannot be said that their Lordships decided that question. In a recent case, which went up to their Lordships of the Judicial Committee reported as 72 I. A. 165,¹⁵ their Lordships make the following observations at p. 174 :

" To make the ancestral property liable, there must in reality be a debt due by the father. In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand (the father), but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property."

In this case, though the point was not raised in the form in which it has been raised in this appeal, their Lordships had to consider the question whether the sale of an ancestral property in execution of a decree against the father is binding on the sons and grandsons of the judgment-debtor. Their Lordships went behind the decree against the father, and inquired into the question of whether the security bond given by the father contained any stipulation binding the father personally. On a construction of the document, their Lordships held that there was no such personal liability contemplated by the deed. Their Lordships held that the entire sale was void as against the other members of the family. Hence, it may legitimately be said that this recent decision of their Lordships of the Judicial Committee supports the contention raised on behalf of the respondents. So far as this Court is concerned, no reported decision of this Court directly bearing on this question has been brought to our notice. The two cases in 2 Pat. L. J. 306¹⁶ and 4 P. L. T. 377¹⁷ do not directly decide the question though they make passing observations tending to support the contention that it is open to the sons in a suit of their own to challenge not only the nature of the debt but also the factum of the debt. But there is an unreported decision of the Division Bench of this Court to which my learned brother Manohar Lall J. was a party : *vide* First Appeal No. 158 of 1935¹⁸ decided on 15th

15. ('45) 32 A.I.R. 1945 P. C. 91 : I.L.R. (1945) Lah. 411 : 72 I. A. 165 (P.C.), Kesar Chand v. Uttam Chand.

16. ('17) 4 A. I. R. 1917 Pat. 375 : 2 Pat. L. J. 306 : 39 I.C. 779, Raghunandan Singh v. Permeshwar Dayal Singh.

17. ('23) 10 A.I.R. 1923 Pat. 443 : 71 I. C. 489 : 4 P. L. T. 377, Dukhit Ojha v. Janki Singh.

18. First Appeal No. 158 of 1935, Kanti Mohan v. Ramballabh Das.

August 1940, in which the question was mooted. The judgment runs into more than 100 pages. On the question in controversy in the present case, my learned brother, Manohar Lal J., made the following observations :

"An elaborate argument was addressed to us on behalf of the parties as to the placing of the onus in such cases. It was argued on behalf of the respondents that the creditor is only required to prove the existence of the judgment-debts and that he paid them, that the sons cannot be allowed to go behind the decree and show that no debt existed for which the decree was passed, and that they can only be allowed to show that the decree-debts were incurred for immoral or illegal purposes. The appellants, on the other hand, argued that it is also open to the sons, who have not been impleaded in the suits which resulted in the judgment-debts, to challenge the debts for which the decrees were passed against the fathers as illusory and non-existent and that the onus was therefore on the creditor to establish by good evidence the existence of the debts paid by him. A large number of cases were cited by the parties in support of their respective contention but in my opinion the matter is really concluded by the observations of Lord Hobhouse in 13 I. A. 1³ where it is pointed out that all that the sons can claim is that being parties to the suits in which the decrees under execution were passed, they should be entitled to try in a suit of their own the fact or the nature of the debt. It is true that this observation is followed by the words 'assuming that this is so,' but this observation of their Lordships has been treated in some decisions in India though not in others as laying down the law that the sons can go behind the decrees. But in the circumstances of the present case the materials are so abundant that the question is only of academic importance. I am of the opinion that the onus is on the creditor to prove the existence of the judgment-debts and that he paid them, and after this has been done the onus is on the sons to prove that those judgment-debts which consisted of decrees in favour of the mortgagee creditor himself could not be binding on the sons because the original debt itself was illusory and non-existent, but so far as the mortgagee has *bona fide* paid third party creditors, relying on the representation of the father that a judgment-debt existed in favour of other creditors, he is protected if he paid these judgment-debts, and is not at all affected if these decrees were obtained for debts which did not exist at all."

On the other hand, Dhavle J. made the following observations in this connection:

"... I am, however, by no means satisfied that as regards the antecedent judgment-debts the appellants were entitled to go behind the decrees. Apart from fraud or collusion, which can always be proved under S. 44, Evidence Act, but which cannot be said to have been the case of the appellants, the decrees would themselves seem to create or constitute debts which would be binding on the judgment-debtors' sons by reason of their pious obligation unless it is shown that the loans were contracted for immoral and illegal purpose."

After referring to the decisions of their Lordships of the Judicial Committee in the
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case reported in 13 I. A. 1³ and 44 Cal. 524,¹⁹ Dhavle J. proceeded to observe as follows:

"... The question how far it is open to the son to go behind the decree in the case of a judgment-debt of his father and show that the decree was not founded on a real debt does not seem to have been decided in any Privy Council case."

Further, after referring to the cases in 33 Cal. 676¹³ and 23 Cal. 262,²⁰ and observing that they appeared to have laid down contrary propositions, Dhavle J. took the view that the question in the case before their Lordships was academic in the view which their Lordships took that the sons did not succeed in proving that any of the original debts on which the decrees were founded were unreal. Hence, the unreported decision of the Division Bench of this Court does not appear to have determined this controversy. Hence, so far as this Court is concerned, the present case is the only one in which this question and only this question has been directly raised, and requires a considered decision. In the Calcutta High Court the exact question was mooted in 23 Cal. 262.²⁰ Prinsep and Ghose JJ. had to consider the question whether a decree, of the year 1875 passed against the father for mesne profits at the instance of his collaterals, could be binding upon the sons who were not parties to the decree, in the sense that the latter in a suit of their own were precluded from showing that their father was not really liable for mesne profits even though he had suffered a judgment against himself in the suit resulting in the decree. After referring to the decision of the Lordships of the Judicial Committee in 6 I. A. 88=5 Cal. 148²¹ and 1 I. A. 321¹ their Lordships came to the conclusion that the sons who were the plaintiffs in the subsequent suit were not precluded by the decree against their father from questioning the reality of the debt on which the decree was founded, and that that question could be gone into in the subsequent suit and decided on evidence in that suit. Their Lordships on a consideration of the evidence held that the plaintiffs' father was not liable for mesne profits for which a decree had been passed against him, and that therefore the sale which took place in execution of the decree against the father did not affect the interests of the other members of the family

19. (16) 3 A. I. R. 1916 P. C. 220 : 44 Cal. 524 : 44 I. A. 1 : 39 I. C. 252 (P.C.), Sripat Singh v. Prodyot Kumar.

20. (96) 23 Cal. 262, Beni Parshad v. Puran Chand.

21. (80) 5 Cal. 148 : 6 I. A. 88 : 4 Sar. 1 (P.C.), Suraj Bansi Koer v. Sheo Pershad Singh.

than the father himself. Hence, it must be held that the decision of the Calcutta High Court, referred to above, is a clear authority in favour of the decision of the lower appellate Court to the effect that the grandsons in the present case could go behind the decree against their grandfather, and show that there was no debt of the father for which a decree could have been passed against him. The later decision of the same Court in 33 Cal. 676¹³ did not raise the exact question to be decided in this case; and the earlier decision in 23 Cal. 262²⁰ was not even noticed in the later case. The only question raised and decided by their Lordships in the later case was whether the son who took the ancestral property by survivorship could be proceeded against in execution of a mortgage decree against the father alone. The son never alleged that there was no debt owing from the father.

In the Madras High Court, a Division Bench of that Court held in 21 Mad. 222⁴ that, in a suit by one of the sons of the mortgagors who had not been impleaded in a previous suit on the mortgage, the plaintiff was entitled to have the question tried whether there was really a debt owing by the father to support the mortgage. The decision of the Madras High Court in 14 M. L. J. 431²² would seem to support the same conclusion. Their Lordships of the Madras High Court in that case have taken the same view of the Full Bench decision of that Court in 27 Mad. 243⁸ as I have suggested. In the Allahabad High Court, a Division Bench is reported to have decided in 51 I. C. 130²³ that to render a son liable for his father's debt the creditor must prove the existence of a debt due by the father; and that the fact that there was a decree against the father, obtained in a suit to which the son was a not party, is not evidence against the son. The decision of a Division Bench of the Allahabad High Court in 37 ALL. 214¹⁰ also would appear to have lent support to the contention that a son, who is not a party to the suit in which a decree is obtained against the father, is entitled to have an opportunity in the execution stage, if the entire family property is threatened, of contesting both the factum and the nature of the debt. Hence, it must be held that whenever the question in controversy between the parties in the present

case has been directly raised in the Calcutta or the Madras or the Allahabad High Court, it has been answered in favour of the view taken by the lower appellate Court.

In the Lahore High Court, a Single Judge is reported to have decided in 60 I. C. 751²⁴ that in Hindu law in order to render a son liable for his father's debts, the creditor must prove the existence of a debt due by the father, and that the mere existence of a decree is not evidence against his son who was not a party to the suit in which the decree was obtained. In a recent Full Bench decision of the same Court in A. I. R. 1944 Lah. 220²⁵ the majority of the Judges appear to have taken the view that where a decree is obtained against the father and is executed against the sons by reason of their pious obligation, the sons are entitled to challenge the existence of the debt on which the decree is based and insist upon proof of the same as against them. The dissentient judgment of Teja Singh J. took the contrary view to the effect that the debt or the obligation must exist qua the father and not qua the son, and that therefore the proof of the debt against the father is sufficient to make the sons liable on account of their pious obligation. These are all the cases which have been brought to our notice on either side. On a consideration of those authorities, the balance of judicial opinion is in favour of the view taken by the lower appellate Court, namely, that it is open to the sons to challenge not only the nature but also the factum of the debt alleged to have been the foundation of a decree passed against the father alone. That being so, it must be held that the plaintiffs respondents in this case were entitled to show that Balmakund did not owe any debt to the appellant firm, and that, therefore, the plaintiffs' interest in the ancestral property was not affected by the decree and the sale in execution of the decree. The appeal must, therefore, be dismissed with costs.

Manohar Lall J. — I have had the advantage of perusing the judgment prepared by my learned brother where he has exhaustively dealt with the case law. I find that the view arrived at by my learned brother is in conformity with the view which I expressed in the unreported case — First Appeal No. 158 of 1935,¹⁸ decided by a Division Bench consisting of Dhavle J. and

22. ('04) 14 M. L. J. 431, Thiruvankata Mudaliar v. Muthu Aiyar.

23. ('19) 6 A. I. R. 1919 All. 378 : 51 I. C. 130, Bhagwant v. Tursi Ram.

24. ('21) 60 I. C. 751 (Lah.), Kasturi Mal v. Lajja Ram.

25. ('44) 31 A. I. R. 1944 Lah. 220 (F.B.), Maha Deo v. Ranbir Singh.

myself on 18th August 1940. In that case I took the view that the matter was really concluded by the observations of Lord Hobhouse in 13 I. A. 1,³

"where it is pointed out that all that the sons can claim is that not being parties to the suits in which the decrees under execution were passed, they should be entitled to try in a suit of their own the fact or the nature of the debt. It is true that this observation is followed by the words 'assuming that this is so', but this observation of their Lordships has been treated in some decisions in India though not in others as laying down the law that the sons can go behind the decrees."

Dhavle J. in his concurrent judgment was not inclined to agree with that view. It is to be observed that the materials were ample in that case for us to give a decision adverse to the sons. Therefore, the decisions are not an authority for the view which I think is the proper view to take of the matter. But having listened to the elaborate argument in this case, I am of opinion that the view there expressed by me is the correct view to be taken, and I am glad that my learned brother has arrived at the same result by an elaborate examination of the authorities. I entirely agree with his reasons and conclusions. If the matter is examined on principle, I do not see any escape from the conclusion at which we are arriving. The pious obligation of the son arises, in my opinion, only when there is in reality a debt in existence which has been incurred by the father provided of course this is not immoral or illegal. Let it be supposed that there is no debt but somehow or other a judgment has been passed against the father, either on contest or without contest. The son under the pious obligation doctrine is not bound to pay the decretal dues as the debt *ex hypothesi* has never been incurred by the father. The rule of *res judicata* cannot apply in such cases, because the son does not claim through his father and I know of no principle under which it has been suggested in some cases that so far as the factum of the debt is concerned, the father must be taken to represent the whole family. With great respect, the father may be taken to represent the whole family only when there is in fact a debt incurred for the purposes of the family. But where a debt does not exist in fact how can it be suggested that for the purposes of that suit in which the son is not a party it must be held or assumed that the father represented the son so that a decision that there was a debt is binding upon the son? Take the most authoritative decision of their Lordships of the Judicial Committee in

51 I. A. 129,²⁶ where their Lordships examined a large number of authorities and laid down five propositions. The second proposition is:

"If he is the father and the reversioners are the sons, he may by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt."

The words 'by incurring debt' and 'of that debt' have been underlined (in italics here) by me. It will be observed that the pious obligation of the son in such a case arises where a father has incurred a debt but the existence of a decree against the father does not mean conclusively that he has incurred the debt. While considering the evidence in the unreported case of this Court noted above, the onus was thrown by me on the creditor to prove the existence of the judgment-debts in the first place and that he paid them, and after that has been done, the onus was thrown on the sons to prove that those judgment debts which consisted of decrees would not be binding on the sons because the original debt itself was illusory and non-existent. In 40 Cal. 288,²⁷ their Lordships of the Privy Council had to consider the right of the father to alienate the ancestral property for his *just debts* so that the alienation may be binding upon the son. Sir John Edge in delivering the judgment of their Lordships observed at p. 295 that

"it must mean a debt which is actually due and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or wanton waste, or with the intention of destroying the interests of the reversioners."

Again the words "debt which is actually due" have been underlined (in italics here) by me. These further considerations support me in the view which I expressed in the unreported case, and I have, therefore, no hesitation in agreeing with the judgment just delivered by my learned brother.

N.S./D H.

Appeal dismissed.

26. ('24) 11 A. I. R. 1924 P. C. 50 : 46 All 95 : 51 I. A. 129 : 77 I. C. 689 (P.C.), Brijnarain v. Mangla Prasad.

27. ('13) 40 Cal. 288 : 17 I. C. 666, Kripal Singh v. Balwant Singh.

[Case No. 116.]

A. I. R. (33) 1946 Patna 347

MANOHAR LALL AND DAS JJ.

Lakshmi Prapannachari and others —

Plaintiffs — Appellants

v.

Satruhana Chari and others, Defendants and another — Respondents.

Appeal No. 426 of 1944, Decided on 6th December 1945, from appellate decree of Second Addl. Sub-Judge, Patna, D/- 29th April 1944.

(a) Religious endowment — Committee of management, appointed trustee and administrator of property having power to appoint shebait — Committee can maintain suit challenging alienation of debottar property by person alleging himself to be shebait.

Where under the deed of trust, the committee of management was appointed trustee and the administrator of the property, also having power to appoint a *shebait* under certain contingencies, and the *shebait* was only looking after the service of the temple and the duties that appertained to it :

Held that the committee could maintain a suit for a declaration that the vendee had acquired no title by the sale deed executed by the vendor in respect of the *debottar* property alleging himself to be the validly appointed *shebait*. [P 352 C 2]

(b) Hindu law — Religious endowment — Shebait, position of.

The expression "*shebait*" is sometimes loosely used to connote two different things. A *shebait* is, by virtue of his office, the administrator of the property attached to the temple of which he is the *shebait*; as regards the property of the temple, he is in the position of a trustee, but as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity. (In the present case the expression was held to have been used in the latter sense.) [P 352 C 1]

(c) Hindu law — Religious endowment — Devolution of office of shebait—Rule of succession to office of shebait laid down by founder shebait—Committee of management empowered to appoint and remove shebait — Acting shebait cannot nominate his own successor.

Where the founder—*shebait*—has for the first time installed idols and under a deed of trust executed by him dedicated his property to the deity and divested himself of all interest therein, the rule of succession to the office of *shebait* laid down by him at the time of the dedication must be deemed to be a part of the rules governing the management of the trust. Where under the deed of trust the committee of management is appointed trustee and the administrator of the property and full authority is given to the committee to appoint a new *shebait* and to remove an existing one in the event of his death, resignation (or abdication) and moral incapacity, it cannot be said that the founder has not disposed of the *shebaiti* rights. In such a case the appointing authority is the committee of management. The *shebait* has no authority to nominate his own successor on the ground that there was no clause in the deed prohibiting such nomination. [P 351 C 1, 2]

(d) Civil P. C. (1908), O. 8, R. 5—Statements in plaint not challenged in written statement—Effect.

There were clear statements made in the plaint that one A had founded four *thakurbaris* in question and had installed the idols therein. Though the defendants in their written statement had challenged A's right to execute trust deed and to appoint trustees, they had not specifically challenged the above statement made in the plaint :

Held that the trial Court was right in finding from the pleadings of the parties that A was the first founder—*shebait*—and was competent to lay down rules governing the management of the trust, and that he was also competent to dispose of the *shebaiti* right. [P 351 C 1]

Mahabir Prasad, B. N. Rai, K. K. Sinha, Prem Lal, Ugrah Singh, M. Fazl Ali and N. Chatterji — for Appellants.

Sarjoo Prasad, Gopal Prasad, Kanhaiyaji, Dasu Sinha and K. D. Chatterji — for Respondents.

Das J. — This is a second appeal by the plaintiffs from a decision of the learned Second Subordinate Judge of Patna, dated 29th April 1944, by which decision the learned Subordinate Judge has substantially reversed the judgment and decree passed by the learned third Munsif of Patna in Title Suit No. 5 of 1940. The suit out of which the appeal has arisen was a suit for a declaration that a sale deed executed by defendant 1, Satruhana Chari (respondent 1 in this appeal) on 30th April 1938, in favour of defendant 2 (respondent 2 here) was invalid, inoperative and illegal, and for setting aside the said sale and recovery of possession of 1.23 acres of raiyati land, conveyed by the said sale deed. The suit was originally brought by plaintiffs 1 to 6 as members of a Managing Committee in respect of certain *debottar* properties (comprising the land in dispute), which I shall presently describe. Plaintiff 7 Mahanth Lakshmi Prapannachari was originally made defendant 3, but was subsequently transposed as plaintiff 7. It was alleged that he was the *shebait* of the deity to which the properties were dedicated. The case of the plaintiffs-appellants was that one Swami Rajendrachari had founded four *thakurbaris*, one after the other, at (1) mauza Muhammadpur Uchaili, (2) mauza Abdhara, (3) mauza Badrabad and (4) mauza Ibrahimabad Terait. In the said *thakurbaris* Swami Rajendrachari had installed idols of Sri Thakurji Maharaj and had dedicated properties acquired by him to each of the *thakurbaris*. Swami Rajendrachari is stated to have executed a deed of trust for the purpose on 31st August 1911. By the said trust deed Swami Rajendrachari constituted a Committee of Management for the purpose of managing and supervising the properties of the *thakurbaris*. Though Swami Rajendrachari himself became the first *shebait* or *gaddinashin* of the said *thakurbaris*, he gave the Committee of Management power to retain him in the said office at their will, and also gave them power to appoint a *shebait* or *gaddinashin* from amongst his disciples in the event of death, resignation or moral incapacity of the existing *shebait*. Swami Rajendrachari died in 1915. After his death, Basudeo Brahmachari was appointed *shebait* by the

Committee. Basudeo Brahmachari, however, mismanaged the properties, and surreptitiously executed a deed of nomination, dated 10th June 1935, in favour of the respondent Satruhana Chari, his nephew, by virtue of which he abdicated in favour of his nephew. The appellants alleged that this deed of nomination was executed fraudulently, surreptitiously and without any authority: therefore, respondent 1 derived no title by it. Then on 30th April 1938, respondent 1 transferred 1.23 acres of land belonging to the deity and lying in village Dhibra in favour of respondent 2 without any legal necessity. Basudeo Brahmachari died during the pendency of the suit, and Mahanth Lakshmi Prapannachari was appointed *shebait* by the Committee, on the death of Basudeo Brahmachari. The appellants' case is that Lakshmi Prapannachari is the rightfully appointed *shebait*. So the appellants prayed for a declaratory relief to the effect that no title to the disputed property had passed to respondent 2 by the said sale deed, and that the property in question should be restored to the rightful *shebait*.

The respondents raised various defences, only some of which are now relevant and need be stated. It was contended that the suit was not maintainable; that Swami Rajendrachari had no authority to execute the deed of trust, dated 31st August 1911; that it was not a deed of trust at all, and was never acted upon; that Basudeo Brahmachari succeeded Swami Rajendrachari as his heir in the ordinary line of succession, and was not appointed by the Committee; that he managed the properties well and by his deed of nomination, dated 10th June 1935, he nominated his *chela* Satruhana Chari (respondent 1) as his heir; that Satruhana Chari succeeded Basudeo Brahmachari as his heir, and was the rightful *shebait*; that the sale deed in question was for legal necessity, the necessity being payment of a decree for rent and arrears of rent; and that Lakshmi Prapannachari was never the *shebait*. The learned Munsif found that Swami Rajendrachari was the founder-*shebait* of the Asthal or *thakurbaris*, and that he had authority to execute the deed of trust. He further found that the deed of trust was acted upon, and Basudeo Brahmachari himself had accepted its terms as binding on him. He further found that Satruhana Chari, respondent 1, was not the *shebait* and that the sale deed executed by him in favour of respondent 2 was not for

legal necessity and did not convey any title to respondent 2. On these main findings, he decreed the suit, and gave the plaintiffs the reliefs they had asked for. On appeal, the learned Subordinate Judge has affirmed the finding of the learned Munsif to the effect that the sale deed in question was a sham transaction and was not justified by any legal necessity. He, however, reversed the findings of the learned Munsif that Swami Rajendrachari was the founder-*shebait* and had authority to execute the deed of trust. He has found that Swami Rajendrachari was not the founder and could not, therefore, lay down the line of succession; alternatively, he has found that even if Swami Rajendrachari was the founder, he had not, on a true construction of the deed of trust, disposed of the *shebaiti* right, therefore, the devolution of the office of *shebait*, after the death of Swami Rajendrachari, would follow the ordinary course of law. On these main findings, he has held that the plaintiffs-appellants have no *locus standi* to bring the suit; they are merely well meaning members of the public, and if they have any grievance against respondent 1, their remedy lies in a suit under S. 92, Civil P. C. The learned Subordinate Judge has, therefore, dismissed the suit, even though he has found that the sale deed in question was a sham transaction. As stated above, the present second appeal is directed against the aforesaid decision of the learned Subordinate Judge.

The first and foremost question for consideration is if Swami Rajendrachari was the founder-*shebait* of the worship of the idol Sri Thakurji Maharaj installed in the four *thakurbaris*. Both the Courts below appear to have considered this question with reference to the pleadings of the parties. The learned Munsif held, on a consideration of the pleadings of the parties, that the respondents had not denied in their written statements the statements made in the plaint that Swami Rajendrachari had founded (*sthapit kia*) four *thakurbaris* and had installed idols of Sri Thakurji Maharaj in the said four *thakurbaris*, and had dedicated properties acquired by him to the said idols. Though the respondents had stated in their written statements that the *mahanth* or *shebait* had no legal right to execute a deed of trust or to appoint trustees, they did not specifically challenge the allegation that Swami Rajendrachari had founded the four *thakurbaris* and installed the idols of Sri Thakurji Maharaj therein. The learned

Munsif further considered the evidence, particularly the evidence of certain witnesses for the respondents, and came to the finding that Swami Rajendrachari was the founder of the worship of the idol of Sri Thakurji Maharaj installed in the four *thakurbaris*. The learned Subordinate Judge appears to have come to a contrary finding; but in arriving at his finding he appears to have misconceived the pleadings of the parties and misdirected himself as to what was actually stated by the plaintiffs in the plaint and what was necessary for them to state. It has been stated in 50 Cal. 292¹ that in the application of the rule that the shebaitship is vested in the founder and his heirs, it may not be always easy to determine who are the founders. As has been observed in that case, one person may provide the site of the temple, another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol. Where the owner of the site relinquishes his right in the land, he may not be a founder, unless he indicates, at the time, expressly or impliedly, that he will associate himself with the others in carrying out the object of the foundation.

I have carefully considered the pleadings of the parties in this case, and I have come to conclusion that the learned Munsif is right in his view that the respondents did not challenge the allegations made in the plaint that Swami Rajendrachari had founded the four *thakurbaris* and had installed the idols in them. The learned Subordinate Judge appears to have taken a very narrow and restricted view of the expression "*sthapit kia*," which is not warranted by what has been stated in Para. 1 of the plaint. It is significant that nowhere did the respondents allege that anybody else was the founder of the worship of the idols installed in the four *thakurbaris*. Learned counsel for the respondents has emphasised before us two points in this connexion. He has drawn our attention to the statements alleged to have been made by a witness, which statements have been referred to by the learned Subordinate Judge, that the idol installed at Ibrahimabad Terait was brought from another village Rustamganj and that the idol was holding 2 to 2½ bighas of land there. It has been contended—this was also the contention before the learned Subordinate

Judge—that this showed that Swami Rajendrachari could not be the founder of the worship of the idol which was installed at Ibrahimabad Terait. I am unable to accept this contention. It is not the case of any of the parties that the worship of the idol which was brought from Rustamganj was founded by anybody else. It may even be that the idol at Rustamganj was a family deity of Swami Rajendrachari, and he brought it to Terait, installed it in a temple and dedicated it to the public. I am, therefore, unable to infer from the statements made by one of the witnesses that the idol installed at Terait was brought from Rustamganj, that Swami Rajendrachari was not the founder of the worship of that idol, when it was installed in a *thakurbari* and dedicated to the public for the first time by the trust deed of 31st August, 1911. Secondly, learned counsel for the respondents has referred to the following statements contained in the deed of trust itself :

"The properties entered in Sch. A appertaining to the *thakurbari* at mauza Ibrahimabad Terait and the properties entered in Sch. B to the *thakurbari* at mauza Muhammadapur and which properties were acquired with my labour and effort as well as with the income from the profits of the properties belonging to the *thakurbaris* and some of which are the gifts of persons having faith in and regard for me by way of *debottar* properties and all of which properties have come in possession and occupation of the Thakurji Maharaj and are in his possession through me as manager."

It is contended that the aforesaid statements show that the idols in the *thakurbaris* were in existence from before the execution of the deed of trust. Reference has also been made to certain entries in the record-of-rights finally published in 1910 which showed that the Thakurji was recorded in respect of some properties in villages Uchaili and Abdhara. The learned Advocate-General has rightly pointed out that the aforesaid statements or entries do not necessarily militate against the claim of the appellants that Swami Rajendrachari was the first *founder-shebait*. The idols might have been family idols which Swami Rajendrachari installed for the first time in 1911 in four *thakurbaris* which he dedicated to the public by the aforesaid trust deed. He would then be the first *founder-shebait* and the original donor, and would be competent to lay down rules governing the management of the trust; *vide* A.I.R. 1937 ALL. 394.² The learned Subordinate Judge was in error when he thought that it was necessary for

1. ('23) 10 A. I. R. 1923 Cal. 142 : 50 Cal. 292 : 74 I. C. 793, Ananda Chandra v. Broja Lal Singha.

2. ('37) 24 A.I.R. 1937 All. 394 : ILR (1937) All. 555 : 169 I. C. 217, Bindrabai v. Sri Rangji Maharaj.

the appellants to give such details as to the place where from the idols were brought, the person who brought them, who was the presiding priest of the ceremony, etc. In view of the clear statements made in the plaint that Swami Rajendrachari had founded the four *thakurbaris* in question and had installed the idols therein, which statements were not contradicted by the respondents, it is clear to me that the learned Munsif correctly found that Swami Rajendrachari was the first founder-*shebait* and was competent to lay down rules governing the management of the trust. He was also competent to dispose of the *shebaiti* right. The finding of the learned Subordinate Judge to the contrary is vitiated by the erroneous view which he has taken of the pleadings of the parties.

Then, there is another aspect of the matter. I have already stated that the respondents did not plead that anybody else was the founder of the worship of the idols; nor did they give any evidence to show that somebody else was the founder. On the contrary, the learned Munsif has referred to the evidence of some of the witnesses of the respondents who had stated that Swami Rajendrachari was the founder. Assuming that Swami Rajendrachari had founded the worship of the idols at some date earlier than 1911, the question would arise if he had reserved to himself the right to alter the line of succession or to interfere in the management subsequently. It has been very strongly contended before us by learned counsel for the respondents that Swami Rajendrachari not having reserved such a right, it was not competent for him to lay down the rules of management by the trust deed executed in 1911. It is the admitted position that there is no earlier deed of endowment. The dedication or endowment of an earlier date, if any, must, therefore, have been oral. Whether Swami Rajendrachari had reserved to himself the right or not would then be a matter of oral evidence and of inference from subsequent conduct. The statements made in the deed of trust show that Swami Rajendrachari had reserved to himself the right to make rules for the management of the trust. In that view also, the rules laid down in the trust deed are valid and binding. I am, however, of the view that by the trust deed of 1911 Swami Rajendrachari for the first time installed the idols, and dedicated the property and divested himself of all interest therein and the rule of succession to the office of *shebait*

laid down by him at the time of the dedication must be deemed to be a part of the rules governing the management of the trust. The learned Subordinate Judge has alternatively found on a construction of the deed of trust that Swami Rajendrachari had not disposed of the *shebait* right. Here again I think, the learned Subordinate Judge is in error. Paragraph 2 of the trust deed states as follows :

"At present, I, the declarant, am the *gaddinashin* of the said *thakurbaris*. The members of the committee are and will be competent to retain me as *gaddinashin* as they wish."

Paragraph 3 of the deed states that:

"In case any *gaddinashin* becomes of loose moral character or dies or leaves the post himself, the members of the committee will be competent to dismiss the *gaddinashin* of loose moral character from the post and to appoint some competent and capable disciple of me as his successor etc."

The two aforesaid paragraphs clearly show that Swami Rajendrachari had disposed of the *shebaiti* right in a particular way. Full authority is given to the committee of management to appoint a new *shebait* and remove an existing one. The three contingencies mentioned in the document are death, resignation (or abdication) and moral incapacity. On either of these three contingencies happening, the Committee of Management is authorised to appoint a new *shebait*. I find it very difficult to understand how the learned Subordinate Judge thinks that Swami Rajendrachari had not disposed of the *shebaiti* right. Learned counsel for the respondents has contented before us that there is no clause prohibiting the *shebait* from nominating his own successor. I have quoted above the statements in Paras. 2 and 3 of the deed. Obviously, there cannot be two appointing authorities, and it is clear to me that the appointing authority in accordance with the terms of the deed of trust is the Committee of Management. Swami Rajendrachari as the founder was entitled to lay down the rule of succession to the office of *shebait* and the rule so laid down by him must be deemed to be a part of the rules governing the management of the trust. In my view, the learned Subordinate Judge was in error in thinking that Swami Rajendrachari had not disposed of the *shebaiti* right by the deed of trust.

It has been contended on behalf of the respondents that the appellants could not maintain the suit. Reliance has been placed on 31 I. A. 203³ and A. I. R. 1938 Pat.

3. ('04) 32 Cal. 129 : 31 I. A. 203 : 8 Sar. 698 (P. C.), Maharaja Jagindra Nath v. Hemanta Kumari Dasi.

394.⁴ In 31 I. A. 203⁵ it has been observed by their Lordships of the Judicial Committee that the right to sue is vested in the *shebait*, although an idol may be regarded as a juridical person capable as such of holding property. Learned counsel for the respondents has contended that the suit as originally brought by the members of the committee was not maintainable and Lakshmi Prapannachari who was originally a defendant should not have been transposed as a plaintiff. Reliance has been placed on the case in 58 Cal. 561,⁶ where it has been observed that if the title of the plaintiff is altogether bad, it is improper to allow an amendment transferring a defendant to the category of plaintiff in order to make the suit good. The facts of that case were, however, entirely different, and the principle laid down therein has no application to the facts of the present case. In that case, the plaintiff claimed title to the property as mortgagee-purchaser thereof on a mortgage from Nanimohan. The defendant who was transferred to the category of plaintiff was one Prabhavati who claimed the property as the widow of Nanimohan and as the *administratrix pendente lite* to his estate. In the present case it can hardly be said that the Committee of Management had no right to suit at all. According to the deed of trust it is the committee of management which manages and supervises the property and appoints the *shebait*. The expression "*shebait*" is sometimes loosely used to connote two different things: a *shebait* is, by virtue of his office, the administrator of the property attached to the temple of which he is the *shebait*; as regards the property of the temple, he is in the position of a trustee; but as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity. In the case under our consideration the Committee of Management is the trustee and administrator of the property, whereas the *shebait* looks after the service of the temple and the duties that appertain to it. In any case the *shebait* is also a co-plaintiff now. The question as to whether the *shebait* Lakshmi Prapannachari could be transposed as a plaintiff came up to this Court, and it was by an order of this Court that he was transposed as a plaintiff. I can see no defect

in the frame of the suit, and I concur in the view taken by the Courts below that the appellants could maintain the suit for a declaration that respondent 2 had acquired no title by the sale deed dated 30th April 1938, and for recovery of possession of the property conveyed by that sale deed.

Lastly, it has been contended before us on behalf of the respondents that it was conceded by learned counsel for the appellants in the Court of appeal below that the property in dispute, namely, the Dhibra property, was the personal property of Swami Rajendrachari; therefore, on that concession the appellants are not entitled to claim that property as *debottar* property. In para. 8 of the plaint it was specifically stated that the property was the *debottar* property appertaining to the *thakurbari*. This was not denied in the written statement. In para. 12 of the written statement it was stated that the disputed property was sold on account of legal necessity to pay off debts and decrees passed against Sri Thakurji. It is clear, therefore, that both parties went to trial on the footing that the disputed Dhibra property was the personal property of Swami Rajendrachari. It appears that in putting forward an alternative argument learned counsel for the appellants had stated in the Court of appeal below that even if Swami Rajendrachari was considered to be the full owner of the Dhibra property, the appellants had a right to challenge the sale deed. I am satisfied that no concession on a question of fact was really made by learned counsel for the appellants. It was the case of both parties that the Dhibra property was *debottar* property of the *thakurbari* of which Swami Rajendrachari was the founder-*shebait*. The pleadings of the parties showed that though this property was subsequently acquired it was acquired from the income of the endowed properties. In accordance with the terms of para. 9 of the trust deed all properties acquired from the income of the endowed properties would be dedicated to the *thakurbaris* and would be managed by the members of the Committee. The very sale deed, Ex. A (1), executed by respondent 1 shows that the property in dispute was *debottar* property and not personal property.

Learned counsel for the respondents has also contended before us that the trust deed of 31st August 1911, was not acted upon. He has placed reliance on Exs. C (5), C (6) and C (7). The Courts below have considered this question with reference to the evidence as it exists in the record and they have concur-

4. ('38) 25 A. I. R. 1938 Pat. 394 : 175 I. C. 218, Kunj Behari v. Shyam Chand.

5. ('31) 18 A. I. R. 1931 Cal. 76 : 58 Cal. 561 : 129 I. C. 860, John Boisogomoff v. Manmathanath Mullik.

rently found that the deed of trust was acted upon and was operative. I see no reason to dissent from that finding. For the reasons given above, I would allow this appeal, and set aside the decision of the learned Subordinate Judge, and restore that of the learned Munsif. Besides the costs of the trial Court as directed by the learned Munsif, the appellants would be entitled to costs of the Court of appeal below and of this Court.

Manohar Lall J. — I agree.

V.W./D.H.

Appeal allowed.

[Case No. 117.]

A. I. R. (33) 1946 Patna 353

SPECIAL BENCH

**FAZL ALI C. J., MANOHAR LALL
AND SINHA JJ.**

Government of Bihar—Petitioner

v.

Motihari Estate Ltd.—Opposite Party.

Misc. Judicial Case No. 112 of 1942, Decided on 9th January 1946, from order of Board of Agricultural Income-tax, Bihar, D/- 8th December 1942.

Bihar Agricultural Income-tax Act (7 [VII] of 1938), Ss. 7(1) (a) and (b) and 17 (3)—Method of assessment — Option — Return showing amount of agricultural income filed—Assessee asked to produce evidence in support thereof—Assessee exercising option to be assessed under S. 7 (1) (a) — Assessee held was entitled to do so.

The assessee filed a return in which he put down certain figures as the amount of agricultural income received by him in the previous year, but the Income-tax Officer did not accept the return as correct and asked the assessee to produce accounts and other evidence in support thereof. The assessee then filed an application stating that the accounts need not be produced as he preferred to be assessed under S. 7 (1) (a) and furnished material to that effect in a revised return. It was contended that as the assessee had already exercised his option in submitting the original return he could not be allowed to change the option already made :

Held that under S. 17 (3) the assessee could file a revised return before the assessment was made. When the assessee filed his second return the assessment had not been made. The assessee therefore was within his right to insist by the revised return that he should be assessed under S. 7 (1) (a) and not under S. 7 (1) (b). The assessee had not made any option in submitting the original return; but he exercised his option only when the Income-tax Officer did not accept the original return as correct and asked the assessee to produce accounts and other evidence, by stating that the accounts need not be produced as he preferred to be assessed under S. 7 (1) (a). [P 354 C 1, 2]

Advocate-General — for Petitioner.

S. N. Bose and Rai T. N. Sahay —

for Opposite Party.

Manohar Lall J. — This is a reference under S. 25 (2) of the Bihar Agricultural 1946 P/45 & 46

Income-tax Act—hereinafter called the Act —by the Board of Agricultural Income-tax, Bihar—hereinafter called the Board—to this Court at the instance of the assessee to answer the contention that

[2] "the income of the assessee should have been computed according to the provisions of S. 7 (1) (a), and not under S. 7 (1) (b) and on this point the Agricultural Income-tax Officer was wrong in his interpretation of the provisions of S. 17 (3) of the Act."

[3] The undisputed facts are these. For the year of assessment 1940-41 the assessee filed a return on 14th November 1941 before the Agricultural Income-tax Officer in respect of his agricultural income for the year ending 31st July 1940. The income returned was Rs. 1,35,088 and was based upon the actual receipts and expenditure in the accounting period. A balance sheet as on 31st July 1940 showing the revenue and profit and loss account for this year prepared by the incorporated accountants was also filed. On 26th May 1941, a notice was served by the Income-tax Officer on the assessee to submit accounts and other evidence in support of his return as the officer was not satisfied that the return was correct and complete. The assessee instead of submitting the accounts filed an application stating that he should be assessed under S. 7 (1) (a). This provision enacts that "the agricultural income mentioned in sub-cl. (2) of cl. (a) of S. 2 shall, at the option of the assessee, be deemed, for the purpose of assessment to agricultural income-tax, to be a multiple" which shall not exceed six—the multiple has now been raised to 8. That application is dated 23rd May 1941 and is to be found at page 13. It states that on 13th February 1941, the assessee submitted a return for the assessment year 1940-41 and that the officer will kindly treat that return as cancelled and substitute the attached one in its place. It is stated further :

[4] "By virtue of the option allowed to us under S. 7 (1) of the Bihar Agricultural Income-tax Act, 1938, we hereby adopt the method of assessment as laid down under sub-s. (a) of S. 7 (1). We have shown in the return the actual rent paid, and in order to arrive at the assessable income this sum will have to be multiplied by the multiple fixed for other district by the Bihar Board of Agricultural Income-tax."

[5] It will be noticed that this application was made before the service on the assessee of the notice issued by the Income tax Officer under S. 18 (2) of the Act—the notice was served on 26th May requiring the assessee to submit accounts and evidence on 10th June 1941. On 3rd June

1941, the assessee was informed by the Income-tax Officer that as he had already exercised his option in submitting the original return, he cannot be allowed to change the basis. On 5th June 1941, the incorporated accountants on behalf of the assessee wrote a letter to the Income-tax Officer, which is to be found at page 14, stating that they have been asked by the assessee to send a reply to the letter of 3rd June 1941. The accountants after drawing attention to S. 17 (3) of the Act, which gives the assessee every right to make a revised return or a fresh return before the assessment is made, requested the Income-tax Officer to accept a fresh return filed by the assessee. The Income-tax Officer did not agree and proceeded to make an assessment based on the original return and found out the actual amount of agricultural receipts. By an order dated 21st June 1941 the assessable income was fixed at Rs. 1,95,068.

[6] Against this assessment the assessee preferred an appeal to the Commissioner of Agricultural Income-tax, who by an order dated 27th January 1942 reduced the assessment to Rs. 1,94,465. The assessee then preferred two applications to the Board on 24th March 1942. He prayed that the order of the Commissioner be revised *inter alia* on the ground that the assessee should have been assessed under S. 7 (1) (a) and not under S. 7 (1) (b) of the Act. By the second petition it was prayed that the question of law should be referred to the High Court for decision. On 10th October 1942 the Board came to the conclusion that there was a question of law whether the assessee was entitled to exercise his option twice before the assessment, and that this question would be referred to the High Court. That question accordingly has been referred to this Court. There were two other minor questions which were disposed of by the Board and no reference has been made to this Court.

[7] In my opinion the assessee was entitled in the circumstances stated above to insist that he should be assessed under S. 7 (1) (a) of the Act. Section 17 (3) is clear and allows the assessee to file a return, if he has not filed it already, or to file a revised return, if he has filed a return already, provided the assessment has not been made by that time. It is provided clearly in that clause that "any return so made shall be deemed to be made in due time under this section." It is admitted that at the time when the

assessee filed his second return on 23rd May 1941, the assessment had not been made. The assessee, therefore, was within his right to insist by the revised return that he should be assessed under S. 7 (1) (a) of the Act.

[8] It is argued on behalf of the Department that the assessee had already exercised his option inasmuch as he filed a return in which he showed the figures of the actual receipts in the previous year, and, therefore, he cannot be allowed to change the option already made. But I do not see that the assessee had made any such option. All he did was to file a return in which he put down certain figures as the amount of agricultural income received by him in the previous year. When the Income-tax Officer did not accept the return as correct and the assessee was asked to produce evidence in support thereof, the assessee then exercised his option by stating that the accounts need not be produced as he preferred to be assessed under S. 7 (1) (a) and he furnished material to that effect in the return.

[9] For these reasons I would answer the question in the affirmative namely that the income of the assessee should have been computed according to the provisions of S. 7 (1) (a) of the Act and that on this point the Agricultural Income-tax Officer was wrong in his interpretation of the provisions of S. 17 (3) of the Act.

[10] As the assessee has succeeded in his contention, he is entitled to the costs of this Court; hearing fee Rs. 150. The assessee will also be entitled to the refund of Rs. 100 which has been deposited with the Board.

[11] **Fazl Ali C. J.**— I agree.

[12] **Sinha J.**— I agree.

V.R./D.H. *Reference answered.*

[Case No. 118.]

A. I. R. (33) 1946 Patna 354

FULL BENCH

FAZL ALI C. J., SHEARER AND SINHA JJ.
M. B. Ram Ran Bijoy Prasad Singh—
Appellant

v.

Ramagya Kuer and others—Respondents.

Second Appeals Nos. 1158 and 1159 of 1943, Decided on 21st January 1946, from appellate decrees of Sub-Judge, Shahabad, D/- 13th July 1943.

(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 112A and R. 82—Tenant's application for reduction of rent disposed of in his absence—Subsequent re-hearing application by tenant—Rent Reduction Officer can re-hear application as proceeding under S. 112A is in nature of suit to which provisions of Civil P. C. become applicable by virtue of Rule 82.

A tenant's application under S. 112A of the Bihar Tenancy Act, for reduction of the rent was taken for hearing on a date of which the tenant had no notice and was disposed of *ex parte*. The tenant subsequently filed a re-hearing application and the Rent Reduction Officer re-heard the application and again reduced the rent further :

Held that the Rent Reduction Officer had jurisdiction to re-hear the application for reduction of rent as the provisions of the Civil Procedure Code were applicable to a proceeding under S. 112A which is to be treated in the nature of a suit by virtue of R. 82 of the Rules framed under Bihar Tenancy Act. [P 356 C 1, 2]

(b) Civil P. C. (1908), S. 11, Explanation 4—Proceeding under S. 112A, Bihar Tenancy Act, being in nature of suit principle of constructive *res judicata* applies—Application by tenant for reduction of rent — Landlord not raising plea that rent had already been reduced on a previous application — Rent reduced by Rent Reduction Officer — Landlord cannot subsequently challenge reduction in separate suit.

Proceedings under S. 112-A of the Bihar Tenancy Act being in the nature of suit the principle of constructive *res judicata* is applicable to such proceeding. Thus, where on an application by a tenant under S. 112-A of the Bihar Tenancy Act for reduction of rent, the landlord did not raise the plea that the rent had already been reduced on a previous application by the tenant and the Rent Reduction Officer reduced the rent :

Held that the landlord cannot in a subsequent suit brought by him raise the question that the Rent Reduction Officer had no jurisdiction to reduce the rent further. [P 356 C 2 ; P 357 C 1]

Sarju Prasad and Harinandan Singh —
for Appellant.

Tarakeshwar Nath — for Respondents.

Fazl Ali C. J. — These second appeals have been referred to a Full Bench for the decision of the following question :

[2] "Whether where on the application of the tenant the rent of an occupancy holding has been reduced under S. 112A (1), cl. (d), the Rent Reduction Officer has jurisdiction again to reduce the rent under S. 112A (1), cl. (d) within the period specified in section 113 save on the grounds indicated therein."

[3] A brief statement of the facts of the case will show that the question which has been referred to us does not arise in these appeals. The question is said to arise in respect of two khatas, namely, khata No. 415/1 and khata No. 416. It appears that on 8th November 1939 on the application of the tenants under S. 112A the Rent Reduction Officer reduced the rent of khata No. 415/1 to Rupees 14 and that of khata No. 416 to Rs. 17-11 0. On 20th November 1939, that is to say, only 12 days after this order, the tenants concerned applied again for the reduction of rent under S. 112A cl. (d) and by his order dated 29th November 1939 the Rent Reduction Officer reduced the rent of khata No. 415/1 to Rupees 7-10-0 and that of khata No. 416 to

Rs. 9-11-0. In spite of this last order the plaintiff landlord brought two suits for recovery of rent for the years 1344 to 1347 at the rates allowed by the first order of the Rent Reduction Officer, that is to say, at the rate of Rs. 14 for khata No. 415/1 and Rs. 17 for khata No. 416. The tenants in defending the suits relied upon the order dated 29th November 1939 and the suits were decreed only at the rates allowed by that order, that is to say, at the rate of Rs. 7-10-0 for khata No. 415/1 and at the rate of Rs. 9-11-0 for khata No. 416. The plaintiff landlord thereupon brought the present suits for a declaration that the reduction of rent allowed by the second order of the Rent Reduction Officer, that is to say, the order passed by him on 29th November 1939 was without jurisdiction and for recovery as damages of the difference between the amount of rent which was allowed by the Court in the rent suit on the basis of the second order of the Rent Reduction Officer and the amount which according to the plaintiff ought to have been allowed on the basis of his first order. In other words, the plaintiff's case was that the first reduction was binding upon him, but the second reduction was liable to be ignored as the Rent Reduction Officer had no jurisdiction to reduce the rent of an occupancy holding for a second time in the course of 15 years.

[4] These suits were contested by the defendants who are the tenants of the two khatas and it was alleged by them in their defence that the first order of the Rent Reduction Officer dated 8th November 1939 was made *ex parte* on the basis of the papers produced by the plaintiff and that when the defendants came to know of the *ex parte* order they filed an application for re-hearing upon which the Rent Reduction Officer again heard the cases in the presence of both the parties and after considering the evidence produced by them passed the second order dated 29th November 1939, this order being one which the Rent Reduction Officer was fully competent to pass.

[5] Both the Courts below have held that the second reduction was not *ultra vires* and the lower appellate Court seems to have accepted the evidence adduced on behalf of the defendants which was to the effect that the second order was passed upon their application for re-hearing the two cases. As the evidence which was given by the defendants in the trial Court on the point has not been reproduced in the judgment, it will be useful to state what the defendant who gave evidence

actually deposed to in the trial Court. What he said was this :

[6] "I had applied for reduction of rent. Of the first date of hearing I had no knowledge and the case was decided *ex parte*. I later asked the Deputy Collector about my case and he said that it had been decided *ex parte*. I showed him my receipt. Thereupon he asked me to file a re-hearing petition. I filed a petition and my case was re-heard in the presence of the plaintiff's servants. The plaintiff did not prefer any appeal."

[7] According to my reading of the judgment of the lower appellate Court this evidence was accepted in its entirety and the question is what is the effect of the finding of the lower appellate Court on this point. A reference to R. 114 which is one of the rules framed under the Bihar Tenancy Act in regard to proceedings relating to the settlement of rent under S. 112A shows that Rr. 82, 83 and certain other rules which were framed by the Provincial Government to govern the proceedings under S. 104 were adopted for the purpose of proceedings under S. 112A also. Rule 82 is to the following effect:

[8] "When the landlord or tenant applies for the settlement of a fair rent he shall be considered as plaintiff and the opposite party as defendant. The proceedings shall be dealt with as suit, and subject to the directions contained in rules 84 to 87 of this Chapter, the Revenue Officers shall adopt, as far as it is applicable, the procedure laid down in the Code of Civil Procedure for the trial of suits."

[9] It is unnecessary to refer to rules 84 to 87 because they do not affect the point which arises in these appeals. In substance what rule 82, when applied to proceedings under S. 112A, provides is that these proceedings will be in the nature of suits and they will be governed as far as possible by the Code of Civil Procedure. According to this rule the tenants who are defendants in the present suits were plaintiffs and the landlord who is the appellant before us was the defendant in the proceedings under S. 112A. If the evidence given by the defendants is correct (and it must be accepted to be correct because it has been accepted by the lower appellate court) what happened in the rent reduction proceedings was that the defendants had made an application for reduction of rent, but it was taken up on a date of which they had no notice and it was disposed of *ex parte*. Thereupon a re-hearing application was filed and the matter was re-heard and a final order was passed on 29th November 1939. The whole question therefore resolves itself into whether the Rent Reduction Officer had jurisdiction to re-hear the application for the reduction of rent in the circumstances stated in the evidence of the defendant. In my opinion the answer to

this question must be in the affirmative if the Code of Civil Procedure is held to apply to the proceedings under S. 112A. In other words, the Rent Reduction Officer was fully competent to re-hear the matter and to decide it afresh. That is what he has done and therefore his order cannot be challenged by the appellant landlord. If the order made by the Rent Reduction Officer was substantially an order upon a re-hearing petition, then the question which has been referred to us does not arise and need not be answered. Any answer which we may give to the question will be academic and will be treated only as *obiter dicta*. It was contended by Mr. Sarjoo Prasad, who argued these appeals very fully and in the course of his argument urged all that could be urged on behalf of his client, that the second application of the defendants cannot be treated as an application for re-hearing because the order which was passed upon it does not purport to be an order passed upon an application for re-hearing a case; but in my opinion this argument can be disposed of on the short ground that the appellant upon whom lay the onus of showing that the order of the Rent Reduction Officer was *ultra vires* ought to have produced the application filed by the tenants, but they have not done so. We have to look to the substance of the proceedings which resulted in the order which is attacked in these appeals and not to the mere form. In my judgment upon the finding of the lower appellate Court there can be no doubt that the order which is attacked as being without jurisdiction was passed upon an application made by the tenants for re-hearing the matter. But assuming for the sake of argument that the second application of the tenants, that is to say, the application made by them on 20th November 1939 was a fresh application and was not an application for re-hearing, the appellant will have to face a further difficulty, that is to say, there will be a bar of *res judicata* involved in the decision of the question which he asks this Court to decide. If the second application was a fresh application, then the proceedings which were started on the basis of that application were suits and the appellant must be regarded as defendant in those suits. If the suits were brought in regard to matters which had already been the subject-matter of a previous suit, it was open to the appellant to show as defendant that those matters could not be re-agitated as they had already been decided in the previous suits. The appellant, however, did not raise any such

defence and therefore Explan. 4 and 5 to S. 11, Civil P. C., will be an impediment in his way. Explanations 4 and 5 run as follows:

[10] Explanation 4:—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

[11] Explanation 5:—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

[12] Section 11, however, lays down that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and has been heard and finally decided by such Court. The appellant did not contend in the second proceedings before the Rent Reduction Officer that the rent could not be reduced further because it had already been reduced by a previous order. If this point had been raised and decided against him, it would have been open to him to appeal against the decision of the Rent Reduction Officer under S. 112A. He did not, however, raise the point before the Rent Reduction Officer and now he wants to raise it in a separate suit. In my opinion the principle of *res judicata* clearly applies to such a situation and the appellant cannot be allowed to raise the point in these suits. I have considered this alternative situation merely upon the hypothesis that the second application for reduction was not an application for re-hearing; but as I have already said, the correct view upon the findings of the lower appellate Court is that those applications were applications for re-hearing. As these appeals fail on the grounds stated in my judgment the question which has been referred to us does not arise and without answering this question I would dismiss these appeals with costs. There will be one set of hearing fee.

[13] Shearer J.—I agree.

[14] Sinha J.—I agree.

K.S. Appeals dismissed.

[Case No. 119.]

* A. I. R. (33) 1946 Patna 357

FULL BENCH

AGARWALA AG. C. J., IMAM AND
DAS JJ.

In the matter of A, a mukhtar —

Petitioner.

Misc. Judicial Case No. 122 of 1945, Decided on 23rd April 1946.

*Legal Practitioner—Misconduct—Relationship between lawyer and his client demands

utmost good faith on part of lawyer—Mukhtar committing criminal breach of trust respecting client's money—Mukhtar struck off Roll—Application for enrolment—Mukhtar's subsequent good conduct testified by number of persons—Petitioner held should not be enrolled as possibility must always arise of another lapse.

The relationship between a lawyer and his client is one that demands the utmost good faith on the part of the lawyer. The ignorance of clients, their inability to be present on every occasion when money is paid or received on their behalf, and the general reputation of members of the profession, all require that a person who derogates from the high standard demanded of a legal practitioner must not be permitted to be in a position where he can harm the interest of his clients, and the reputation of the profession to which he belongs, and, at the same time, the reputation of the Court for the administration of justice. Lawyers are officers of the Court, and their misconduct cannot but affect that trust which litigants are entitled to place in the conduct of legal proceedings. [P 358 C 1]

Where, therefore, a Mukhtar applied to be enrolled as such, his name having been struck off the Roll on a finding that he had committed criminal breach of trust in respect of a sum entrusted to him by a client, and a number of persons testified to his good conduct since the original proceedings were taken against him:

Held that although the reputation of the petitioner was somewhat better than it was at the time of the original proceedings taken against him, the moral lapse which had occurred then was such as to indicate that the petitioner was not a person who should be placed in a position of trust where the possibility must always arise of another lapse. [P 358 C 1]

M. Fazl Ali—for Petitioner.

Government Advocate—for the Bar Council.

Agarwala Ag. C. J. — This is an application by a person who was a Mukhtar to be enrolled as such, his name having been struck off the Roll by an order of this Court in 1937 on a finding that he had committed criminal breach of trust in respect of a sum of Rs. 130 entrusted to him by a client for the purpose of being deposited in Court to avoid an execution sale of the client's holding. The result of the embezzlement was that the holding was sold. The Court, after a full consideration of the circumstances of the case, decided that the applicant was not a fit person to be retained on the Roll of legal practitioners, and accordingly struck his name off the Roll. In 1938 the petitioner made an application to this Court to be re-instated. This application was summarily dismissed by a Bench presided over by the then Chief Justice. In 1943 he made a second application for being re-instated. This application was heard by a Bench of

three Judges presided over by the then Chief Justice who observed :

" [2] I do not think that a person who has shown himself capable of committing such a serious breach of duty should be re-instated."

[3] The view which this Court has consistently taken in this case, and in other cases involving a breach of trust on the part of a lawyer in respect to money entrusted to him by a client, has, I am glad to say, not been altered by anything that has been addressed to us to-day. The relationship between a lawyer and his client is one that demands the utmost good faith on the part of the lawyer. The ignorance of clients, their inability to be present on every occasion when money is paid or received on their behalf, and the general reputation of members of the profession all required that a person who derogates from the high standard demanded of a legal practitioner must not be permitted to be in a position where he can harm the interest of his clients, and the reputation of the profession to which he belongs, and, at the same time, the reputation of the Court for the administration of justice. Lawyers are officers of the Court, and their misconduct cannot but affect that trust which litigants are entitled to place in the conduct of legal proceedings. The petitioner has attached to his petition a number of certificates granted to him by persons who testify to his good conduct since the original proceedings were taken against him. It is gratifying to know that the reputation of the petitioner is somewhat better now than it was in 1937. But the moral lapse which occurred then was such as to indicate that the petitioner is not a person who should be placed in a position of trust where the possibility must always arise of another lapse. I would, therefore, dismiss this application.

[4] **Imam J.**— I agree.

[5] **Das J.** — I agree.

V.R./D.H. *Application dismissed.*

[Case No. 120.]

A. I. R. (33) 1946 Patna 358

FULL BENCH

AGARWALA AG. C. J., SHEARER AND
IMAM JJ.

Pratap Udai Nath Sahi Deo

v.

Baraik Mohan Sahu and others.

Appeal No. 991 of 1942, Decided on 1st May 1946,
from appellate decree of Addl. Sub-Judge, Ranchi,
D/-29th August 1942.

Chota Nagpur Tenancy Act (6 [VI] of 1908),
Ss. 198, 208 and 210 (1) and (2)—Words "any
other property, movable or immovable" in
sub-ss. (1) and (2) of S. 210 do not refer to
tenure or holding respecting which decree has
been made—Words do not refer to some lesser
interest belonging to judgment-debtor therein—
Decree for arrear of rent of tenure—One of per-
sons holding interest therein not impleaded—
Attempt to execute decree by sale of tenure
defeated on this ground—Application to exe-
cute decree under S. 210 (2) by sale of right,
title and interest of judgment-debtors in tenure
—S. 198 held did not apply—Right, title and
interest of judgment-debtors held was not sale-
able under S. 210 (2) — Deputy Commissioner
held had power to execute decree under S.
208 : 1941 P. W. N. 553=(42) 29 A. I. R. 1942
Pat. 84=199 I. C. 83, OVERRULED.

The words "any other property, movable or
immovable" occurring in both sub-s. (1) and sub-
s. (2) of S. 210 must mean the same thing in both
sub-sections. It is obvious that these words in sub-s.
(1) refer to property entirely independent of the
tenure or holding in respect to which the decree
has been made, for after the tenure or holding has
been sold under S. 208, there is no other interest
in it belonging to the judgment-debtor, and, there-
fore, the words cannot be held to refer to some les-
ser interest belonging to the judgment-debtor in the
tenure or holding. The same words in sub-s. (2)
cannot be differently construed so as to refer to
such lesser interest belonging to the judgment-
debtor in the tenure or holding. [P 360 C 1]

When under the Act the Deputy Commissioner can
pass a decree for arrears of rent, although all the
parties interested in the tenure are not impleaded,
and the Act authorises the Deputy Commissioner
to execute the decree (S. 182) by process of execu-
tion against the property of the judgment-debtor
(S. 184) it must be presumed that the Legislature
intended such a decree to be executable. In the
absence of any specific provision for execution of a
decree for an arrear of rent, when the decree has
been made in a suit from which a person holding
an interest in the tenure has been omitted, S. 208
should be so construed as to carry out the inten-
tion of Legislature. Nor is it, indeed, violating the
language of that section to apply it to such a case.
[P 361 C 1]

Where a landlord obtained a decree in a suit
for recovery of rent of a resumable tenure in
which a person who owned an interest in the
tenure was not impleaded and an attempt to
execute the decree by sale of the tenure having
been defeated on account of an objection that the
tenure was not liable to be sold as all the persons
interested in it had not been impleaded in the
suit, the decree-holder applied for execution of the
decree under S. 210 (2) by sale of the right, title
and interest of the judgment debtors, after ob-
taining the previous permission of the Deputy
Commissioner :

Held (1) that S. 198 did not apply to the decree
in the case : 1941 P. W. N. 553=(42) 29 A. I. R.
1942 Pat. 84=199 I. C. 83, OVERRULED.

[P 361 C 2]

(2) That the right, title and interest of the
judgment-debtors in the tenure was not saleable un-
der S. 210 (2), but

(3) that the Deputy Commissioner had power to
execute the decree by sale of the right, title and
interest of the judgment debtors (under S. 208)
although his power to do so was not derived from

S. 210 (2) : ('36) 23 A.I.R. 1936 Pat. 615 and ('33) 20 A. I. R. 1933 P. C. 122 (P. C.), *Disting.*

[P 361 C 2]

L. K. Jha, G. C. Mukherji and A. K. Chatterjee—for Appellant.

Rai Parasnath and L. K. Chaudhary — for Respondents.

Agarwala Ag. C. J. — The following questions have been referred to this Bench by a Division Bench :

[2] (1) Whether, in the circumstances of the case, the right, title and interest of the judgment-debtors in the tenure could be sold under S. 210 (2) of the Chota Nagpur Tenancy Act, and (2) whether 1941 P. W. N. 553¹ was correctly decided.

[3] As this reference is in a Second Appeal, the whole appeal is before us. The facts are that the landlord brought a suit for recovery of rent of a resumable tenure known as Fulsuri Lot, but failed to implead in the suit one Mt. Dukha, who owned an interest in the tenure. Having obtained a decree, the plaintiff sought execution of it. One of the judgment-debtors, Bandhu Sahi, died before the execution sale was held. In the suit and execution proceedings he was impleaded not only because he owned a share in the tenure, but also as the guardian of his minor brother. A previous attempt to execute the decree by sale of the tenure had been defeated on account of an objection that the tenure was not liable to be sold as all the persons interested in it had not been impleaded in the suit. In the present execution the decree-holder applied for the sale of right, title and interest of the judgment-debtors, stating that his application was made under S. 210 (2) of the Chota Nagpur Tenancy Act, the permission of the Deputy Commissioner having been obtained. An objection was raised that S. 210 (2) did not apply to the sale of the right, title and interest of the judgment-debtor in a tenure where the decree, in respect of which it was sought to sell the right, title and interest, was for the rent of the tenure. This objection was upheld by the executing Court, but was overruled in appeal by the Judicial Commissioner on 22nd June 1938. Shortly before this, on 8th June, an amendment of S. 210 came into operation. The judgment-debtors again objected to the sale of the right, title and interest of the judgment-debtors, basing their objection on subsection (2) as amended. This objection was overruled both by the executing and the appellate Courts, with the result that the right, title and interest of the judgment-debtors was put up for sale and was purchased by

defendant 4, that is to say, the right, title and interest of the judgment-debtors who were parties to the execution proceedings was put up for sale and purchased by defendant 4. The plaintiff, who is one of the persons interested in the tenure, and who was a party to the suit and the execution proceedings, instituted the suit out of which this appeal has arisen for a declaration that his right, title and interest in the tenure was not affected by the sale and for recovery of possession. Both the Courts below have decreed the suit holding that the right, title and interest of the judgment-debtors could not be sold under S. 210 (2) of the Act.

[4] On behalf of the appellant it is contended that there is no provision in the Act for sale of the right, title and interest of a judgment-debtor in execution of a decree against some of the owners of the tenure, when the decree has been obtained for the rent of that tenure, owing to a lacuna in the Act, and that the Deputy Commissioner has no jurisdiction to execute the decree which he himself made. The latter part of this contention is clearly unsustainable in view of the provisions of S. 182 which declares that a decree or order passed by a Deputy Commissioner under this Act may be executed either by his own Court, or by any other prescribed Court. The more difficult question, however, is how such a decree is to be executed. Section 184 provides that process of execution may be issued either against the person or the property of the judgment-debtor, but shall not be issued simultaneously against both person and property. The procedure for proceeding against the person of the judgment-debtor, or for the sale of his movable property, is set out with particularity in the following sections. In S. 193 provision is made for execution of a decree for money against the immovable property of the judgment-debtor when the decree is not in respect of money due or recoverable as an arrear of rent.

[5] When a decree has been passed by the Deputy Commissioner under the Act for an arrear of rent due in respect of a tenure or holding, the decree-holder is authorised by S. 208 to apply for the sale of the tenure or holding, and the tenure or holding may then be brought to sale in accordance with provisions relating to the sale of under-tenures contained in the Bengal Rent Recovery (Under Tenures) Act, 1865. All the provisions of that Act are declared to apply to such a sale except ss. 12 to 15. If the proceeds of the sale are insufficient to satisfy the decree, S. 210(1) authorises the issue of execution pro-

1. ('42) 29 A. I. R. 1942 Pat. 84 : 199 I. C. 83 : 1941 P. W. N. 553, *Inderjit Nath v. Pratap Uday Nath*.

cess against any other property, movable or immovable, belonging to the judgment-debtor. Sale of the tenure under S. 208, however, is not the only method by which the holder of a decree for the rent of the tenure may execute the decree, for sub-s (2) of S. 210 authorises the decree-holder, subject to the permission of the Deputy Commissioner to proceed against any other property, movable or immovable, of the judgment-debtor without first applying for sale of the tenure in respect of the rent of which the decree has been made. As has been already stated, in the present instance, when applying for execution of the decree, one decree-holder stated that his application was one under S. 210 (2), and it is contended by the defendant-appellant that a sale held under the provisions of this sub-section, in the circumstances of the present case, was a valid sale.

[6] The contention that S. 210 (2) applies to this case must be overruled. The words "any other property, movable or immovable," occurring in both sub-s. (1) and sub-s. (2) of S. 210 must mean the same thing in both sub-sections. It is obvious that these words in sub-s. (1) refer to property entirely independent of the tenure or holding in respect to which the decree has been made, for after the tenure or holding has been sold under S. 208, there is no other interest in it belonging to the judgment-debtor and, therefore, the words cannot be held to refer to some lesser interest belonging to the judgment-debtor, in the tenure or holding. The same words in sub-s. (2) cannot be differently construed so as to refer to such lesser interest belonging to the judgment-debtor in the tenure or holding. There is no section of the Act which specifically provides for the sale of the right, title and interest of the judgment debtor in a tenure or holding. It is, therefore, contended that when the decree is one for arrears of rent in respect of a tenure or holding and the tenure or holding itself is not liable to sale under S. 208 by reason of the omission of the plaintiff to implead all the persons having an interest in the tenure or holding, the decree is incapable of execution by the Deputy Commissioner. If this contention were to prevail, it would follow that although a Deputy Commissioner may make a decree in respect of an arrear of rent even when all persons interested in the tenure or holding are not parties to the suit, he has no power to execute that decree, although S. 182 expressly empowers him to execute any decree made by him under the Act.

[7] In support of his contention the respondent relies on 18 P. L. T. 36,² a decision of a Division Bench of this Court, and 12 Pat. 626,³ a decision of the Privy Council. In the latter case a decree for rent had been obtained without impleading all the persons interested in the tenure, and in execution of that decree the tenure had been put up for sale. A person holding a mortgage then instituted a suit for a declaration that his interest was not affected by the sale, as the sale held in execution of a decree made in such a suit did not pass the tenure so as to have the effect of annulling a pre-existing encumbrance on it. At the end of the judgment of the Privy Council there is an observation that the sale was void. But a perusal of the passage preceding this observation shows that, on an examination of the claim in the suit, the Privy Council was satisfied that what the decree-holder intended to proceed against was the interest of the defendants in the tenure. What the decision really means is that, if the decree-holder intends to proceed only against the interest of the defendant in the tenure, the sale of the tenure itself is void. The decision cannot be regarded as an authority for the proposition now contended for that, when it is only the right, title and interest of the judgment debtor that is put up for sale, the sale of such right, title and interest is void. The Division Bench decision of this Court, to which reference has been made, appears to be based on this decision, the facts of which do not appear to have been fully appreciated.

[8] In 1941 P. W. N. 553¹ which is referred to in the order of reference, it was held by a Division Bench of this Court that S. 198 of the Act governs the execution of a decree for arrears of rent when the decree, by reason of the omission of a person interested in a tenure, is incapable of execution by sale of the tenure itself. The learned Judges who decided that case appear to have overlooked the words "not being money due or recoverable as an arrear of rent" in that section. The observations regarding S. 210 (2) are *obiter*.

[9] The question remains, however, how a decree for an arrear of rent is to be executed when it is not executable by sale of the

2. ('36) 23 A. I. R. 1936 Pat. 615 : 15 Pat. 439 : 165 I. C. 959 : 18 P. L. T. 36, Pratap Uday Nath Sahi Deo v. Baraik Lal.

3. ('33) 20 A. I. R. 1933 P. C. 122 : 12 Pat. 626 : 60 I.A. 176:142 I.C. 781 (P.C.), Jagdishwar Dayal Singh v. Dwarka Singh.

tenure by reason of the omission to implead a person who has an interest in the tenure. The only sections of the Act providing for the sale of property of the judgment-debtor in execution of a decree for rent are ss. 208 and 210. As has already been shown, S. 210 relates to property belonging to the judgment-debtor other than the tenure, or any interest he may have in it. On behalf of the respondent it is contended that a decree for an arrear of rent within the meaning of S. 208 means a decree for an arrear of rent which is executable by a sale of the entire tenure or holding, and excludes a decree which is not so executable. It must be admitted that had there been other provisions in the Act for execution of a decree for an arrear of rent, not executable by sale of the tenure or holding, there would be much to be said for the contention of the respondent. But when you have an Act under which the Deputy Commissioner may pass a decree for arrears of rent, although all the parties interested in the tenure are not impleaded, and the Act authorises the Deputy Commissioner to execute the decree (S. 182) by process of execution against the property of the judgment-debtor (S. 184), it must be presumed that the Legislature intended such a decree to be executable. In the absence of any specific provision for execution of a decree for an arrear of rent, when the decree has been made in a suit from which a person holding an interest in the tenure has been omitted, S. 208 should be so construed as to carry out the intention of the Legislature. Nor is it, indeed, violating the language of that section to apply it to such a case.

[10] A decree such as we have in the present instance is a decree for an arrear of rent in respect of a tenure notwithstanding that a person holding an interest in the tenure was omitted from the suit in which the decree was made, and the section expressly authorises the decree-holder to apply for the sale of the tenure in execution of the decree. Whether the tenure actually passes by the sale is, of course, another matter. In a case where all the necessary parties have been impleaded the tenure itself will pass by the sale. But where a person holding an interest in the tenure has not been impleaded, all that will pass by the sale is the interest of those persons holding an interest in the tenure who are impleaded. In the present case what the decree-holder was entitled to sell was the right, title and interest of the judgment-debtors. That is

what the auction-purchaser knew that he was buying. Although the decree-holder wrongly described his application as one under section 210 (2), no one has been prejudiced by this mistake. I would answer the questions formulated in the reference as follows :

[11] (1) 1941 P. W. N. 553¹ was wrongly decided in so far as it decided that S. 198 of the Act applies to a decree for the payment of money even when the money is an arrear of rent; and (2) the right, title and interest of the judgment-debtors in the tenure was not saleable under S. 210 (2) of the Act.

[12] But, for the reasons stated above, I would hold that the Deputy Commissioner had power to execute the decree by sale of the right, title and interest of the judgment debtor, although his power to do so was not derived from S. 210 (2). The appeal is accordingly allowed with costs.

[13] **Shearer J.**—I agree.

[14] **Imam J.**— I agree.

V.R./D.H.

Appeal allowed.

[Case No. 121.]

A. I. R. (33) 1946 Patna 361

SPECIAL BENCH

**FAZL ALI C. J., MANOHAR LALL
AND SINHA JJ.**

Province of Bihar — Petitioner

v.

F. R. Hayes and others —

Opposite Party.

Misc. Judicial Case No. 73 of 1943, Decided on 28th January 1946, from order of Board of Agricultural Income-tax, Bihar, D/- 29th May 1943.

(a) Bihar Agricultural Income-tax Act (7 [VII] of 1938), S. 11—'Beneficiaries,' meaning explained — S. 11 does not apply to income received by full owners of property through their servant or manager.

S. 11 is meant to apply to those cases where land is held by a trustee or someone whose position in relation to the land is similar to that of a trustee and the "beneficiaries" referred to in S. 11 are those persons who have merely beneficial interest in a property, while the legal ownership of the property vests in a person or persons who hold the property for their benefit. It follows that an owner cannot become a beneficiary merely by executing a power of attorney in favour of another person authorising him to manage his own property. Hence the section cannot have been intended to apply to income received by full owners of property through their servant or agent or manager.

[P 363 C 1, 2 ; P 364 C 1]

(b) Bihar Agricultural Income-tax Act (7 [VII] of 1938), S. 11 — Individual holding separate powers of attorney from different proprietors regarding their specific shares in estate cannot

be said to be holding land — S. 11 does not apply to such case.

The word "land" which is used in S. 11 being singular, must be taken to apply to one unit of agricultural property and not to a number of separate and independent properties. Hence, an individual, holding separate powers of attorney from different proprietors regarding their respective specific shares in the estate, cannot be said to be holding the 'land' within the meaning of S. 11, and S. 11 does not apply to such a case.

[P 364 C 1, 2 ; P 365 C 1]

(c) Bihar Agricultural Income-tax Act (7 [VII] of 1938), S. 25—Statement must not be drawn up by some one representing Board.

Section 25 of the Act clearly contemplates that the statement must be drawn up and referred to the High Court by the Board and not by some one representing the Board. [P 365 C 1]

Dr. P. K. Sen and M. K. Mukherjee —
for Petitioner.
Advocate-General and Government Pleader —
for Opposite Party.

Fazl Ali C. J.—This is a reference by the Board of Agricultural Income-tax, Bihar, under S. 25 (2), Bihar Agricultural Income-tax Act (7 [VII] of 1938). The question which the assessee asked the Board to refer was framed on their behalf in these words :

[2] "Whether an individual, holding separate powers of attorney from different proprietors re-

garding their respective specific shares in the estate, can be said to be holding the land within the meaning either of S. 11 or of S. 12, Bihar Agricultural Income-tax Act, 1938."

[3] The Board in submitting the question to this Court has expressed the following opinion (see Board's Resolution dated 22nd April 1943) :

[4] "It seems to the Board that there is no question of law involved in the application of S. 12 which certainly does not apply to the present case but that there is a question of law whether S. 11 applies to the manager on behalf of a number of share-holders, each share being separate and distinct and separately recorded in the Collectorate registers. A reference will be made to the High Court on this point."

[5] The assessee in the present case are 15 persons who inherited specific shares in an estate in Purnea from one Mrs. Hayes. They reside in different parts of the world and each of them has executed a general power of attorney in favour of one Mr. Picachy authorising him to manage the property which devolved upon him upon the death of Mrs. Hayes. The incomes received by the various assesseees have been set out in the following schedule which is printed at page 3 of the paper-book : —

Serial Names of proprietors.			Extent of shares.					Amount of profits.		
No.	A.	G.	C.	K.	D.	R.	J.	Rs.	As.	P.
1. F. R. Hayes, Esqr.	...	1	17	3	...	1	...	3253	1	6
2. John Kisson Hayes	18	3	1	2	...	1626	8	9
3. Mrs. Mary Affleck Hayes	18	3	1	2	...	1626	8	9
4. Mrs. L. M. Jelbert	...	1	17	3	...	1	...	3253	1	6
5. Miss M. N. Hayes	...	1	17	3	...	1	...	3253	1	?
6. Mrs. M. E. Bettley	...	1	17	3	...	1	...	3253	1	?
7. Mrs. V. G. Dickinson	...	1	17	3	...	1	...	3253	1	6
8. Mr. G. P. Cammiade	6	1	2	2	6	558	2	1
9. Mr. P. F. Cammiade	6	1	2	2	6	558	2	1
10. Mr. T. B. Cammiade	6	1	2	2	6	558	2	1
11. Mrs. A. M. Fellows	18	1	1	...	...	1578	11	4
12. Mr. A. H. W. Bentinck	12	2	1	...	6	1084	5	10
13. Mr. D. W. Bentinck	12	22	1	...	6	1084	5	10
14. Mrs. A. W. Perrie	12	2	1	...	6	1084	5	10
15. Mrs. G. Holyoak	17	3	...	1	...	1530	13	10
Total.			16	...	...	...	...	27,555	9	7

[6] The real question to be decided in this reference is whether the 15 assesseees should be assessed on their separate incomes or the income received by them should be added together and the aggregate amount should be taxed under S. 11 of the Act. The contention put forward on behalf of the assesseees is that their income cannot be lumped together for the purpose of assessment and that they are not liable to be assessed at all because the individual income of each assessee is less than Rs. 5000. They point out that it is most unjust that persons whose income is just a little over Rs. 1000 or Rs. 500, should be assessed at all or assessed at rates applicable to more than

25 to 50 times these figures respectively. The schedule shows that in the year of accounting three of the assesseees had received Rs. 558 each; three Rs. 1084 each and the highest income received by any of the assesseees did not exceed Rs. 3253 odd. The assesseees' contention has been negatived by the agricultural income-tax authorities and it has been held that their case is covered by S. 11 of the Act and the aggregate of their incomes in the hands of Mr. Picachy is liable to assessment under that section.

[7] It has been conceded on behalf of the Department that the assesseees have no community of interest with each other; that they reside in different countries such as

England, East Africa, India etc., and that Mr. Picachy was appointed by them at different times and under different powers of attorney and it is a mere coincidence that he is the holder of a power of attorney on behalf of all the assesseees. But it has been held that the terms of S. 11 are wide enough to cover a case like the present and to justify the assessment of the total agricultural income. Section 11 runs thus :

[8] "(1) Save as provided in Ss. 9, 12 and 13 if a person holds land from which agricultural income is derived partly for his own benefit and partly for the benefit of beneficiaries, or wholly for the benefit of beneficiaries, agricultural income-tax shall be assessed on the total agricultural income derived from such land at the rate which would have been applicable if such person had held the land exclusively for his own benefit, and the agricultural income-tax so payable shall be assessed on the person holding such land, and he shall be liable to pay the same. (2) Any person holding such land shall be entitled, before paying to any beneficiary the amount of agricultural income which such beneficiary is entitled to receive from the agricultural income derived from such land, to deduct the amount of agricultural income-tax at the rate at which the agricultural income is or will be assessed under sub-s. (1).

Explanation : — In this section 'beneficiary' means a person entitled to a portion of the agricultural income derived from the land."

[9] In my opinion the language of the section strongly suggests that it was meant to apply to those cases where land is held by a trustee or someone whose position in relation to the land is similar to that of a trustee. Trust has been defined by Sir Arthur Underhill in his well-known treatise relating to the Law of Trust and Trustees as follows :

[10] "Trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries) of whom he may himself be one and any one of whom may enforce the obligation."

[11] Another well-known definition of trust is to be found in the Indian Trusts Act and it runs as follows :

[12] "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner : the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust property' or 'trust money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument if any, by which the trust is declared is called the 'instrument of trust'."

[13] It is true that there is no express refer-

ence to trust property in S. 11, but one who is familiar with the legal conception of a trust cannot fail to observe that the words used in S. 11 have a strong resemblance to those which are used in the two definitions. Trust may be express or implied or constructive but the common feature of all trusts is that (1) there should be a person who has possession or custody of some property (2) there should be a person or persons for whose benefit the property is held by the former and (3) there must be an obligation annexed to the ownership of the property for the benefit of another and the owner. The person who is entitled to certain benefits in the property is described as a beneficiary. This well-known legal expression has been defined in Wharton's Law Lexicon as follows :

[14] "A person having the beneficial enjoyment of property of which a trustee, executor etc. has the legal possession, in which sense it is gradually superseding the old term *cestui que trust*."

[15] This is the accepted legal sense in which the expression "beneficiary" is commonly used and I have no reason to think that it could have been intended to be used in an entirely different sense in this section. It is true that the explanation to the section purports to define the term "beneficiary" and states that the expression means "a person entitled to a portion of the agricultural income derived from the land." But this definition cannot be taken to be exhaustive or complete. The framers of the Act must be assumed to have known the accepted legal meaning of the expression and also known that the term "beneficiary" in law is not generally used with reference to a full legal owner but with reference to a person who has "beneficial interest" in some property which is usually in the possession and control of another person. The distinction between beneficial interest and legal ownership is one of the most notable features of a trust and in my judgment "beneficiaries" referred to in S. 11 are those persons who have merely beneficial interest in a property, while the legal ownership of the property vests in a person or persons who hold the property for their benefit.

[16] In the present case, Mr. Picachy is merely an agent of the assesseees and not the legal owner of the property, whereas every one of the assesseees is the full legal owner of a distinct unit of property, over which he has complete dominion. He is something more than a beneficiary, because he is not

merely entitled to receive the income of the property but he can deal with it in any way he likes. He has also powers to remove his agent whenever he likes and either take over the management of the property himself or appoint another agent to manage it. It is elementary that such a person is not a mere beneficiary of the property in the accepted sense of the term and as I have already observed I do not think that the accepted sense is excluded by definition which is to be found in the Explanation to Section 11 of the Act. Apart from its legal meaning even in ordinary use the expression "Beneficiary" is seldom employed with reference to a full owner. In the Oxford Dictionary its meaning is stated to be "one who receives benefits or favours; a debtor to another's bounty." Even according to this meaning a beneficiary would be a very different person from a full owner who has complete dominion over his property and whose right is not limited to mere enjoyment of a certain part of the income of the property. It follows that an owner cannot become a beneficiary merely by executing a power of attorney in favour of another person authorising him to manage his own property. Therefore my conclusions are (1) that the definition of "beneficiary" as given in the Explanation to S. 11 must be held to be controlled by its accepted legal meaning, otherwise it will be too wide and will cover persons who could not have been intended to be dealt with in that section and (2) that the section could not have been intended to apply to income received by full owners of property through their servant or agent or manager.

[17] Even if we assume for the purpose of this reference that S. 11 may be given the meaning which has been given to it by the Board, there would still be considerable difficulty, in my opinion, in applying it to the present case because of the fact that the word "land," which is used in S. 11 being singular, must be taken to apply to one unit of agricultural property and not to a number of separate and independent properties. In the present case each assessee holds a separate share in the estate and each share forms an independent unit of agricultural property by itself. Therefore in law each assessee holds a different property. From this it must necessarily follow that Mr. Picachy is the holder of 15 different properties (which we may refer to as properties A, B, C, D, etc.) belonging to 15 different persons. It is not disputed that the owner of

each property, that is to say, each of the present assessee is entitled to the whole income of the property which is held by him, that is to say, one assessee is entitled to the whole income derived from A, another assessee is entitled to the whole income derived from B and the next assessee is entitled to the whole income derived from C and so on. As each share forms a separate unit of property, none of the assessee is entitled merely to a portion of the agricultural income derived from that property and therefore in the present case the assessee do not come within the definition of the word "beneficiary" as given in the section. That S. 11 will not be applicable to a case like the present may be illustrated by a more obvious example. Let us suppose that Mr. Picachy was appointed to manage a certain property on behalf of X in the district of Patna; another property on behalf of Y in the district of Muzaffarpur and a third property on behalf of Z in the district of Darbhanga, X, Y, and Z having nothing to do with each other and being separate owners of these properties. I do not think that in such a case the language of S. 11 would justify the assessment of the aggregate agricultural incomes of these three persons X, Y, and Z derived from the properties in three different districts, merely because they happen to be managed by the same person. The difficulty in the way of such assessment will, as I have already indicated, be created by the use of the word "land" which obviously means one distinct unit of property. The word "land" will not apply to three different and independent estates belonging to three different persons in different parts of the province. X, Y, and Z would not be hit by S. 11 because they would be respectively entitled to the whole income derived from their respective estates in Patna, Muzaffarpur and Darbhanga and would not therefore be included in the definition of "beneficiary" which means a person entitled to a portion of the agricultural income.

[18] If S. 11 was not intended to apply to the case covered by the illustration, it could not have been intended to cover the present case because, as I have already said, though by coincidence the assessee have become entitled to specific shares in the same estate, yet each share constitutes a distinct unit of property and their case is not distinguishable in principle from that of a number of owners having different estates in different parts of the province.

[19] I would, therefore, while recognising that S. 11 is somewhat clumsily drafted and therefore seems at first sight to be capable of being construed in the manner in which it has been construed by the Board, hold that according to its true meaning it cannot be held to apply to the assessee concerned in this reference. I would, therefore, upon the facts stated in the reference answer the question which has been referred to us in the negative.

[20] When this reference was put up before us it was brought to our notice that the statement of the case which was submitted to us under S. 25 (2) purported to have been signed only by the Secretary to the Board of Revenue. At that time we were constrained to point out that S. 25 of the Act clearly contemplated that the statement must be drawn up and referred to the High Court by the Board and not by some one representing the Board. We had to take notice of the sudden departure from the usual practice because it was the common feature of several references and in one case at least the statement which was submitted to the Court did not bear the signature of any person with the result that no one could say who had drawn up the statement. Fortunately the learned Advocate-General realised that the statement was not in order and necessary corrections have been made. We hope that in future the statements will be drawn up and submitted to this Court in conformity to the provisions of the Act under which the statements are to be submitted. The assessee is entitled to the costs of the reference which are assessed at Rs. 250 and they are also entitled to a refund of Rs. 100 deposited by them.

[21] **Manohar Lal J.** — I agree.

[22] **Sinha J.** — I agree with my Lord, the Chief Justice.

D.S./D.H. *Answered in negative.*

[Case No. 122.]

A. I. R. (33) 1946 Patna 365

MEREDITH AND RAY JJ.

Darsan Singh — Appellant

v.

Baldeo Das — Respondent.

Appeal No. 370 of 1943, Decided on 4th January 1946, from original order of Sub-Judge, Bhagalpur, D/- 24th July 1943.

(a) Civil P. C. (1908), S. 41—Certificate under — Section prescribes no particular form — Intimation by transferee Court of dismissal of execution sufficient.

Section 41 prescribes no particular form of the certificate. Intimation by the transferee Court that the execution case is dismissed as infructuous is a sufficient compliance with the provisions of the section. [P 366 C 2]

C. P. C. —

(44) Chitaley, S. 41, N. 2.

(41) Mulla, S. 41, Page 169 "Shall certify."

(b) Civil P. C. (1908), Ss. 38 and 41 — Court transferring decree for execution still retains jurisdiction to pass proper orders — Order by transferor Court appointing Receiver for sale of property before receipt of certificate under S. 41 held proper.

The fact that a transferee Court retains jurisdiction until the certificate under S. 41 is sent does not necessarily involve that no other Court can have jurisdiction. To hold so would be equivalent to holding that simultaneous execution in two Courts is impossible, whereas it is well established that in proper circumstances, there can be simultaneous execution in different Courts. The Court passing the decree, even after it has transferred it for execution, retains jurisdiction to pass proper orders in connexion with execution in proper circumstances and the jurisdiction of the transferee Court is only subordinate to that of the Court which has made the decree : *Case law discussed.* [P 366 C 2; P 367 C 1]

Where the Court passing the decree passed an order in execution appointing a Receiver to sell a charged decree before the receipt of the certificate under S. 41, from the Court to which the decree was transferred for execution :

Held that there was no reason to hold that the order of the Court was without jurisdiction.

[P 369 C 1]

C. P. C. —

(44) Chitaley, S. 38, N. 10, Pt. 1.

(41) Mulla, S. 42, Page 171, Pt. (b).

K. N. Lal — for Appellant.

B. K. Rai and P. K. Bose — for Respondent.

Meredith J. — This is an appeal by the judgment-debtor against an order rejecting his application under S. 47, Civil P. C., in execution proceedings.

[2] The facts are as follows. In the year 1931 one Binraj and others brought a suit on the basis of a handnote against the Ranis of Lachmipur and the appellant Darsan Singh. In 1933 a decree was obtained against the Ranis, but not against Darsan Singh, but in appeal, on 4th May 1937, the High Court decreed the suit against all. In the year 1935, the same plaintiffs brought a similar suit in the Calcutta High Court against Anant Prasad as a surety. On 21st June 1937, that suit was compromised, and under the terms of the compromise an instalment decree was passed for a sum of Rs. 13,000. The plaintiffs, moreover, assigned their decree against the Ranis and Darsan Singh to Anant Prasad, and Anant Prasad charged the transferred decrees for satisfaction of the decree against him. It was pro-

vided that the charge could be enforced by execution without separate suit.

[3] This decree was transferred to Bhagalpur for execution and in Execution Case 186 of 1938 Binraj and others sought to proceed at Bhagalpur against the properties of Anant Prasad. On 6th December 1938, Anant Prasad took the objection that the decree could only be executed by enforcement of the charge. This objection succeeded, and on 7th July 1939 the execution case was dismissed. According to the execution register, the result was communicated to the Calcutta High Court on 12th September 1939. Meanwhile there was an appeal to the High Court, and on 28th February 1940, the High Court held that there could be no execution against the personal property of Anant Prasad unless and until an attempt had first been made to execute the decree by enforcement of the charge.

[4] Thereafter, on 16th July 1941, an application was made in the Calcutta High Court for enforcement of the charge by the appointment of a Receiver to realise the decree against Darsan Singh. One Mr. D. N. Sinha was appointed Receiver, and authorised to sell the charged decrees. Accordingly, on 30th December 1941, the Receiver sold the decrees to the respondent Baldeo Das. This man then in the present Execution Case No. 84 of 1942 sought to execute the decrees transferred to him against Darsan Singh.

[5] Darsan Singh objected under S. 47, Civil P. C., that the transfer of the decrees to Baldeo Das was invalid, since the Calcutta High Court had no jurisdiction to appoint a Receiver, or authorise him to make the transfer. The reason put forward was that as the decree had been transferred to Bhagalpur and the Bhagalpur Court had sent no certificate under S. 41, Civil P. C., to the Calcutta High Court, the latter had no seisin of the case and no jurisdiction to pass any orders for execution. This contention has been rejected by the learned Subordinate Judge. Mr. K. N. Lal for the appellant urges the same point. He contends that the entry in the execution register does not show that there was a certificate sent under S. 41, and in the absence of any such certificate the sole jurisdiction lay with the Bhagalpur Court, and the Calcutta High Court had no jurisdiction.

[6] In the first place, I am of opinion that the entry in the register does indicate sufficient compliance with the provisions of S. 41. Section 41 prescribes no particular form of

certificate, and, in my judgment, the sending of an intimation that the execution case had been dismissed as infructuous would amount to sufficient compliance.

[7] In the second place, however, I agree with the Court below that even if it be assumed that no certificate had been sent, still it is not a correct proposition that the transferor Court had no jurisdiction to pass any orders. Mr. Lal has relied upon a number of rulings which I shall deal with very briefly. None of them really touch the point of jurisdiction. In some of them it is held that the transferee Court does not lose its jurisdiction until the certificate under S. 41 is sent. The fact, however, that the transferee Court retains jurisdiction does not necessarily involve that no other Court can have jurisdiction. To hold this would be to hold that simultaneous execution in two Courts is impossible, whereas it is well settled that in proper circumstances there can be simultaneous execution in different Courts; where, for example, the judgment-debtor holds properties in different districts each of them insufficient in itself to satisfy the decree. Others of the rulings cited merely lay down that where a decree had been transferred for execution the proper Court for applications in connection with that execution proceeding is under O. 21, R. 10, the transferee Court, and not the transferor Court. Applications made to the transferor Court which should have been made to the transferee Court cannot, therefore, be regarded as step-in-aid of execution within the meaning of Art. 182, cl. (5), Limitation Act. It is one thing, however, to say that a Court is not the "proper Court" as defined in the explanation to Art. 182, and quite another thing to say that it has no jurisdiction in connection with the execution of the decree. On the contrary, it is perfectly evident not only from a number of rulings to which I shall refer, but from certain provisions of the Code of Civil Procedure itself, that the transferor Court still retains jurisdiction to pass proper orders in connection with the case. I refer in particular to O. 21, R. 26, which provides that—to cite only the relevant portions:—

[8] "The Court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, . . . for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court . . . if execution had been issued thereby, or if application for execution had been made thereto."

[9] It is sufficiently obvious from this provision that the framers of the Code never contemplated that after the order of transfer the transferor Court should lose all jurisdiction in connection with the case. Not only that, but O. 21, R. 23 expressly provides that

[9a] "any order of the Court by which the decree was passed in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution."

[10] Coming now to Mr. Lal's rulings, he relies, in the first place, upon the Privy Council decision in *Maharajah of Bobbili v. Narasaraaju Peda Sinhulu* (43 I.A. 238).¹ This however, was merely a decision as to whether a certain application to the transferor Court after transfer of the decree could be regarded as a step-in aid to save limitation. It was held that it was not an application to the proper Court, because after the transfer no certificate had been sent under S. 41, nor had the decree been returned, and also the application was one to the transferor Court to sell property which lay within the jurisdiction of the transferee Court and had already been attached by the latter. It was obviously an application which the transferor Court had no jurisdiction to entertain. This decision should not be carried further than what it actually says, and as such it clearly does not touch the point before us.

[11] Next Mr. Lal relies upon *Rangaswami Shetti v. Sheshappa Manjappa Shimpi*.² That was merely a decision which followed the Privy Council case just referred to, and held that an application to the transferor Court in certain circumstances was not a step-in-aid.

[12] The other decisions are those in which it has been rightly, if I may say so with respect, held that the transferee Court retains jurisdiction until it sends the certificate. They do not really touch the point before us, for the reason I have already given.

[13] In *Sheshaiyer Rajamanner Aiyer v. Madanmohan Patnaik* (11 Pat. 513)³ it was held that the transferee Court still retains jurisdiction until the certificate is sent. The same thing was held in *Shivlingappa v. Shidmailappa* (A. I. R. 1924

Bom. 359)⁴ which, it be noted, was a decision in favour of the creditor.

[14] In *Muhammad Ibrahim v. Chhatoo Lal* (A. I. R. 1926 Pat. 274)⁵ it was held that the transferee Court ceases to have jurisdiction after it has sent the certificate.

[15] The last case of *Jwala Prasad v. Thakur Dwarka Dhishji* (A.I.R. 1937 ALL. 474)⁶ is a single Judge decision wherein it was held that the mere sending of the certificate under S. 41 does not terminate the jurisdiction of the transferee Court if the copy of the decree has been retained. I desire to express no opinion on the correctness of that decision, and will merely say that it does not touch the point which we have to decide.

[16] None of Mr. Lal's cases seem to me really to support the proposition he has put forward. On the other hand, there are not wanting many decisions in which the contrary view has been clearly taken. There is Privy Council authority for the proposition that the transferor Court does not lose all seisin of the case. In *Jang Bahadur v. Bank of Upper India, Ltd.* (A. I. R. 1928 P. C. 162)⁷ their Lordships said :

[17] "Under cl. (c) of S. 39 of the Code of 1908, a decree, directing the sale of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. *On such transfer the former Court does not altogether lose seisin of the decree.* But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstance attending such failure (S. 41). If the judgment-debtor dies, before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. *This is a matter of procedure and not of jurisdiction.*" (Italics mine.)

[18] In *Baij Nath Goenka v. F. H. Holloway* (1 C. L. J. 315)⁸ it was argued that when a decree has been transferred by the Court which made it that Court has no jurisdiction to entertain any application for execution in respect thereof and that there

1. ('16) 3 A. I. R. 1916 P. C. 16 : 39 Mad. 640 : 43 I. A. 238 : 36 I. C. 682 (P. C.).

2. ('22) 9 A. I. R. 1922 Bom. 359 : 47 Bom. 56 : 68 I. C. 506.

3. ('32) 19 A.I.R. 1932 Pat. 286 : 11 Pat. 513 : 139 I. C. 843.

4. ('24) 11 A.I.R. 1924 Bom. 359 : 80 I. C. 752.

5. ('26) 13 A.I.R. 1926 Pat. 274 : 5 Pat. 398 : 94 I. C. 36.

6. ('37) 24 A.I.R. 1937 All. 474 : 170 I. C. 28.

7. ('28) 15 A.I.R. 1928 P. C. 162 : 3 Luck. 314 : 55 I. A. 227 : 109 I. C. 417 (P.C.).

8. ('05) 1 C. L. J. 315.

could not be two simultaneous executions of the same decree. The Court rejected these contentions. Mookerjee J. said :

[19] "As regards the first branch of the contention, I think it is clear from the Code, that when the Court which has made a decree, has transferred it for execution to another Court, it does not thereby completely lose all jurisdiction in respect of execution thereof. . . . I find it difficult to hold that the decree-holder himself cannot make an application for execution, because execution is pending in some other Court. In my opinion although a decree may have been transferred for execution it is open to the decree-holder to make an application for execution, in order to enable him to obtain rateable distribution under S. 295, Civil P. C., to the Court which passed the decree and which holds the assets realised."

[20] Their Lordships also referred to several cases in which it had been held that simultaneous execution was possible.

[21] *J. C. Galstaun v. F. E. Dinshaw* (A. I. R. 1927 Cal. 581)⁹ was a case where the Bombay High Court had transferred a decree for execution to the Subordinate Judge of Alipore. To the latter an application was made for attachment of the moveables of the judgment-debtor. The Subordinate Judge kept allowing time after time to the judgment-debtor instead of making attachment. Thereupon an application was made to the Bombay High Court to issue a precept under S. 46 of the Code to the Subordinate Judge of Alipore to attach the moveables. This was done. The matter was taken in appeal to the Calcutta High Court, and it was contended that the order of the Bombay High Court was without jurisdiction, as the decree had been transferred by it. This contention was rejected, and it was held that the precept was valid and must be carried out by the Subordinate Judge of Alipore. In this case Graham J. observed :

[22] "It is well settled, and this has not been disputed, that the Court which passes a decree can issue executing writs simultaneously to more than one. If that is so, there does not seem to be any reason why a Court having already transferred a decree for execution should not issue a precept which is but another and a special form of execution, to another Court."

[23] *Rajani Kant v. Golam Mohiuddin* (A. I. R. 1935 Cal. 99)¹⁰ was a case where a decree passed by the Court of Alipore had been transmitted to the Court at Ranchi, where it was executed and the execution case was dismissed on part satisfaction on 30th April 1930. In April 1933, an application was filed by the decree-holders in the Court of Alipore. Thereupon the Court of Alipore wrote to the Court at Ranchi inquiring about the decree, and on 19th June 1933, a

reply was received in which it was stated that the execution case had been dismissed on part satisfaction. Thereupon the execution was registered. It was held that though on the date of the application to the Alipore Court it might not have been in a position to grant it until it had made inquiries from the Ranchi Court, yet there was no justification for treating the application made to the Alipore Court as being made to a Court without jurisdiction.

[24] In *Krishna Prazanna Lahiri v. Sarojinee Debee* (I.L.R. (1937) 2 Cal. 734)¹¹ it was held that where a decree, that had been transferred to another Court for execution, is returned unexecuted, production of a certified copy of the order of the transferee Court containing all the essentials of a certificate of non-satisfaction is a sufficient compliance with the requirements of S. 41, Civil P. C., and a new petition for execution will be competent, even if the certificate of non-satisfaction of the transferee Court has not arrived, provided that no other execution proceedings are pending elsewhere.

[25] In *Dwarka Nath v. Imperial Bank of India* (56 Cal. 1176)¹² it was said :

[26] "There is no principle on which it can be said that simultaneous execution in the Court which passed the decree and the Court within the local limits of the jurisdiction of which the judgment-debtor resides is illegal."

[27] Obviously if there can be simultaneous execution in both Courts, it is clear that the Court which passed a decree has not lost jurisdiction merely by reason of the transfer.

[28] Then there is the case of *Makkhan Lal v. Mt. Bhagwana Kuer* (A. I. R. 1936 All. 655).¹³ This is a case very much in point. It was held that there is no bar against execution in one Court against the property and in another Court by another means. Where a decree passed by one Court is transferred to another for execution, the decree-holder is entitled to make an application to the transferor Court, inasmuch as concurrent execution of decrees is permissible, and if it appears to such Court that the judgment-debtor is making no efforts to pay up the decretal amount it can direct execution of the decree by arrest of the judgment-debtor. In this decision reference was made to a previous decision of the Allahabad High Court, *Sarasti Prasad v. Peoples' Industrial*

11. ('37) 24 A.I.R. 1937 Cal. 557 : I.L.R. (1937) 2 Cal. 734 : 174 I. C. 12.

12. ('29) 16 A.I.R. 1929 Cal. 529 : 56 Cal. 1176 : 122 I. C. 289.

13. ('36) 23 A.I.R. 1936 All. 655 : 162 I. C. 51.

9. ('27) 14 A.I.R. 1927 Cal. 581 : 102 I. C. 513.

10. ('35) 22 A.I.R. 1935 Cal. 99 : 154 I. C. 731.

Bank, Ltd. (15 A. L. J. 532)¹⁴ where it was held :

[29] "Where a decree is passed by one Court and is transferred to another for execution the decree-holder is entitled to make an application for execution to the former Court, inasmuch as concurrent execution of decrees is permissible."

[30] Lastly, reference may be made to a Single Judge decision of the Bombay High Court, *Fatechand Rampratap Marwadi v. Jitmal Rupchand* (53 Bom. 844)¹⁵ wherein it was held that having regard to Ss. 38 to 42, Civil P. C., the Court which passed the decree had jurisdiction to pass orders in execution proceedings notwithstanding that the decree had been transferred for execution to another Court. His Lordship emphasised the distinction between an order which is wrong and an order without jurisdiction as pointed out by the Privy Council in *Malkarjan v. Narhari* (25 Bom. 337).¹⁶ He pointed out that because a decreeing Court may not be a proper Court in which a certain step-in-aid of execution may be taken it does not follow that it is, therefore, a Court entirely without jurisdiction in respect of the decree which it has itself made. After referring to Ss. 39 to 42 of the Code he says :

[31] "None of these sections suffices as a basis for the argument that a decreeing Court not merely delegates but also deprives itself of jurisdiction by the mere act of transferring the decree, and the provisions as to certification are meant to safeguard the judgment-debtor against unnecessary harassment and not to deprive the decreeing Court of its jurisdiction."

[32] With respect I agree with these observations. The effect of a perusal of the relevant provisions of the Code and of the decisions I have just dealt with is to my mind to make it clear that the Court which passes the decree even after transferring still retains jurisdiction to pass proper orders in connection with execution in proper circumstances, and the jurisdiction of the transferee Court is subordinate to that of the Court which has made the decree. In the present case I have already held that there is no reason to believe that an intimation equivalent to a certificate was not sent, but in any event there is nothing upon which it could be held that the order of the Calcutta High Court appointing a Receiver and authorising him to sell, the decree was without jurisdiction. I may observe further that the assignment of the decree has not been challenged

by the decree-holder, and it is difficult in the circumstances to see how it can lie in the mouth of the judgment-debtor to challenge the assignment. There is, in my view, no substance in Mr. Lal's contention. The order of the Court below upon this point is correct.

[33] Mr. Lal has also sought to raise a point of limitation. He points out that both the decrees were passed in 1937. He argues that Execution Case No. 186 of 1938 could not be regarded as a step-in-aid, since it was held that it was infructuous, execution being sought against property which was not liable, unless and until the charge had been enforced. That application was finally disposed of by the appellate Court on 28th February 1940, and the application in the Calcutta High Court was not made until July 1941, more than three years after the date of the decree. Without agreeing with Mr. Lal that the application could not be regarded as a step-in-aid it is unnecessary to decide that point. It is enough to say that it is irrelevant. The decree under execution is the decree against Darsan Singh. Even if it be assumed that execution of the decree against Anant Prasad had become time-barred, that would not necessarily render the assignment void, or bar execution of the decree against Darsan Singh. There is nothing whatever before us to show that execution of the decree against Darsan Singh was ever allowed to become barred. A point of limitation was taken before the Court below, but it appears that it was not pressed and no materials were placed before the Court below to show that that decree was barred by limitation. In the circumstances it is clear that it cannot be contended before us, completely without any material, that that decree was time-barred.

[34] In the result I would dismiss the appeal with costs.

Ray J. — I entirely agree.

D.R.R.

Appeal dismissed.

[Case No. 123.]

A. I. R. (33) 1946 Patna 369

SPECIAL BENCH

AGARWALA AG. C. J., IMAM AND DAS JJ.

In the matter of Devasaran Lall Sinha — Petitioner.

Misc. Judicial Case No. 63 of 1945, Decided on 23rd April 1946.

Bar Councils Act (1926), Ss. 14 (b) and 8 (2) — Person enrolled as advocate in Bombay

14. (17) 4 A.I.R. 1917 All. 129 : 39 I. C. 729 : 15 A. L. J. 532.

15. (29) 16 A.I.R. 1929 Bom. 418 : 53 Bom. 844 : 123 I. C. 507.

16. (01) 25 Bom. 337 : 27 I. A. 216 : 7 Sar. 739 (P.C.).

mentioned in the decree that each party will get half the share, one towards the east and the other towards the west, and it is not very clear on the face of the allotments stated in the decree whether this property has been left joint. However, leaving this question open, it is quite clear that at least with regard to one item of property mentioned above a joint decree within the meaning of Explan. 1 to Art. 182 has been passed in favour of several decree-holders and as against several judgment-debtors jointly.

[4] In support of this contention learned counsel has cited a decision of the Calcutta High Court, 36 C. W. N. 772.¹ In that case there was a partition decree in which a very narrow strip of land furnishing egress and ingress to the house and a *kalikhola* had been left joint. After the decree, the plaintiff had brought an execution case and got delivery of possession of certain properties which had been separately allotted to him. The respondent decree-holders of that appeal filed an execution, and the question of limitation was raised on the ground that their application was beyond three years from the date of the decree, but it was within three years from the date of the execution taken out by the plaintiff. The contention was that even though the decree was several and separate in respect of the major portion of the properties the very fact that a portion however small was left joint would bring the decree within the meaning of a joint decree. Rankin C. J. said:

[5] "It seems to me that the decree before us is certainly one passed jointly in favour of the plaintiff and the present respondents so far as the *kalikhola* and the road are concerned unless the decree is for the present purpose to be regarded as though there was one decree for joint possession in favour of the respondents and the plaintiff and another and different decree for separate possession of their allotments by the respondents. I think the appeal must fail."

[6] In other words, his Lordship held that the decree cannot be divided into two and be considered as one a decree for separate possession and another a decree for joint possession. The decree should be taken as one whole. This decision was followed in this Court in A. I. R. 1940 Pat. 147² in which it was said where a partition decree has allotted certain properties in severalty to each of the parties but has reserved a portion as joint with the

parties, such decree must be regarded as joint decree within the meaning of Explan. 1 to Art. 182. In this particular case, before the filing of this execution petition, Baldeo Prasad, one of the joint decree-holders and also one of the joint judgment-debtors, had started execution in the month of July 1942, which was within three years of the final decree, and this execution case should enure to the benefit of the present decree-holders as well in view of the Explanation to Art. 182, Limitation Act so as to give a fresh start after limitation. In the circumstances this appeal must be allowed, and the order of the learned Subordinate Judge set aside. As there is no appearance for the respondents the appellants are not entitled to any costs in this Court.

Meredith J. — I agree.

V.R./D.H.

Appeal allowed.

[Case No. 125.]

A. I. R. (33) 1946 Patna 372

FAZL ALI C. J. AND PANDE J.

Kheali Rai and another — Petitioners
v.

Rampal Kamkar — Opposite Party.

Civil Revn. Appln. No. 486 of 1944, Decided on 26th November 1945, from order of Munsif, Chapra, D/- 20th March 1944.

Bihar Tenancy Act (8 [VIII] of 1885), Ss. 171A and 174—Difference between Ss. 171A and 174, explained — Deposit made after sale—S. 171A does not apply.

Section 171A is applicable when the deposit is made before the sale, whereas S. 174 is intended to cover cases when the deposit is made after the sale. Section 171A is narrower in its application than S. 174 and evidently applies before the sale takes place. Under S. 171A it is necessary to deposit only the decretal amount with costs and no other sum, whereas under S. 174 over and above the decretal amount a sum equal to 5 per cent. of the purchase money has to be deposited. [P 373 C 1,2]

Hence where the tenant makes the deposit after the sale and the deposit so made includes not only the decretal amount but also the amount which was payable to the auction purchaser, S. 171A is not applicable to such a case and the tenant is not entitled to be put in possession of the holding.

[P 373 C 2]

K. N. Lall — for Petitioners.

Sambhu Prasad Singh for *G. P. Singh*

— for Opposite Party.

Fazl Ali C. J. — This is an application in revision from an order of the Munsif of Chapra, dated 20th March 1944. In order to elucidate the point raised in this application certain facts may be briefly stated. The opposite party is a tenant of a holding comprising 4 *bighas* 3 *kathas* 2 *dhurs* of *khata* No. 130 of village Chamaria for which a sum

1. (32) 19 A. I. R. 1932 Cal. 869 : 139 I. C. 786 : 36 C. W. N. 772, *Man Mohan Gope v. Madhusudan Gope*.

2. (40) 27 A. I. R. 1940 Pat. 147 : 185 I. C. 59, *Sarjuprasad v. Deoki Singh*.

of Rs. 32 is payable as rent. Petitioner 1 is the *zarpeshgidar* of a portion of this holding and is liable to pay Rs. 9 under the *zarpeshgi* and petitioners 2 to 4 who are *zarpeshgidars* for other portions are liable to pay Rs. 8 out of the total rent. It appears that the landlord of the holding obtained a rent decree for arrears of rent for the years 1345 to 1348 and in execution of the decree the holding was sold. After the sale the opposite party deposited a sum of Rs. 176.7-6 and thereupon the sale was set aside. After the sale was set aside, the opposite party asked the Court to apply the provisions of S. 171A, Bihar Tenancy Act, in his favour and put him in possession of the *zarpeshgied* property. This application has succeeded and hence this application in revision. Section 171A reads as follows:

[2] "Notwithstanding anything to the contrary contained in any law, when a tenure or holding or portion thereof, mortgaged by tenant, has been advertised for sale under this Chapter or in execution of a certificate for arrears of rent due in respect thereof, signed under the Bihar and Orissa Public Demands Recovery Act, 1914, for default of the mortgagee who was liable under the terms of the contract between him and the mortgagor for payment of the arrears of rent for which the decree or certificate was obtained, and the mortgagor tenant pays into Court the amount requisite to prevent the sale —

(a) the amount so paid by him together with fifty per centum of the said amount by way of compensation shall be deemed to be a debt due from the mortgagee, and

(b) the mortgagor shall, on application to the Court executing the decree, be entitled to be put in possession of the tenure or holding or portion thereof by ejecting the mortgagee and to retain possession of it until the debt has been discharged."

[3] This section must be read along with S. 174 which is a provision for enabling a certain class of persons including a judgment-debtor to apply for setting aside the sale of a holding for arrear of rent on depositing within thirty days from the date of the sale the amount recoverable under the decree with costs together with a sum equal to 5 per cent. of the purchase money. On comparing the language of the two sections, it seems clear that S. 171A is applicable when the deposit is made before the sale, whereas S. 174 is intended to cover cases when the deposit is made after the sale. If the deposit is made before the sale and after the properties are advertised for sale and also if the holding is in the possession of the mortgagee and it appears that the sale has taken place owing to his default then the mortgagor is entitled to be put in possession of the holding by ejecting the mortgagee

and to retain possession of it until the debt has been discharged. This section therefore is narrower in its application than S. 174 and evidently applies before the sale takes place. Under this section, it is necessary to deposit only the decretal amount with costs and no other sum, whereas under S. 174 over and above the decretal amount a sum equal to 5 per cent. of the purchase money has to be deposited. Evidently in this case the deposit was made under S. 174 because it included not only the decretal amount, but also the amount which was payable to the auction purchaser. Strictly speaking therefore S. 171A was not applicable to the facts of the present case.

[4] It was contended that in any event the deposit was made to save the property and S. 171A ought to be liberally construed. It was further contended that the Legislature must have intended that S. 171A should cover a case of the present description. In my opinion this case cannot be brought under S. 171A without stretching the language of that section which we are not permitted to do. It was open to the Legislature to make S. 171A applicable to a case like the present, but that has not been done. The order of the Court below seems to me to be incorrect and I would therefore allow this application and set aside the order under revision and also dismiss the original application of the respondent by which he claimed possession of the property which is in possession of the *zarpeshgidar*. The petitioner will be entitled to his costs. Hearing fee is assessed at one gold mohur.

Pande J.—I agree.

D.S./D.H. *Application allowed.*

[Case No. 126.]

A. I. R. (33) 1946 Patna 373

IMAM AND BEEVOR JJ.

Emperor

v.

Tuti Babu — Accused.

Death Reference No. 30 and Criminal Appeal No. 521A of 1945, Decided on 9th November 1945, from decision of Judicial Commissioner, Chota Nagpur, D/- 10th August and 30th July 1945, respectively.

(a) Criminal P. C. (1898), S. 256 (2)—Everything stated in written statement of accused under S. 256, Criminal P. C., is not legal evidence, though Court should give due consideration to it—Documents filed with written statement need not be considered unless duly proved — Evidence Act, Ss. 3, 61 and 62.

No doubt when a written statement is put in on behalf of the defence a Court should give due

consideration to it, but it does not necessarily follow that everything stated therein is necessarily legal evidence. [P 378 C 2]

There may be circumstances where the documents are put in which require no formal proof or documents which may be admitted by both sides in which case the Court may be justified in referring to them; but documents which are undoubtedly inadmissible until formally proved need not be considered by a Court whether filed with a written statement or otherwise unless duly proved: (28) 15 A. I. R. 1928 Mad. 1135, *Not foll.* [P 378 C 2]

Per Beevor J. — A written statement filed on behalf of an accused is not a statement made by a witness nor can it be treated as a document produced for the inspection of the Court within the meaning of S. 3, Evidence Act. The statement of the accused is not strictly evidence even though the Court may consider it. [P 380 C 1]

In one sense the Court is bound to consider any document which is tendered before the Court for the purpose of being admitted in evidence, but that is a different thing from considering it as evidence. Documents should not be tendered with the written statement but should be tendered separately for admission in evidence and it will then be open to the Court to decide whether such documents require proof before they can be admitted in evidence, but the Court should not accept other documents as part of the written statement. [P 380 C 2]

(b) Criminal P. C. (1898), S. 256 (2) — Provision in, applies to sessions cases.

Though S. 256 (2) which directs that if the accused puts in any written statement the Magistrate shall file it with the record, appears in the chapter relating to the trial of warrant cases, the provision is actually applicable in sessions cases as such written statements have always been admitted. [P 380 C 2 ; P 381 C 1]

Cr. P. C. —

(46) Chitaley, S. 256, N. 12; S. 290, N. 6.

Government Advocate—for the Crown.

S. Bashiruddin, Ragho Saran Lal and M. Fazl Ali—for Accused.

Imam J. — There are seven appellants in this appeal. Jugeshwar Bux Rai has been sentenced to death by the Judicial Commissioner of Chota Nagpur who convicted him for an offence under S. 302/149, Penal Code. He was also convicted under S. 148, Penal Code and sentenced to three years' rigorous imprisonment which was directed to come into effect in the event of his conviction under S. 302/149 being set aside. The appellants Inderdeo Singh son of Bhola Singh and Inderdeo Singh son of Padarath Singh were convicted under S. 302/34, Penal Code and sentenced to transportation for life. They were also convicted under S. 302/149 and S. 148, Penal Code, and under S. 148 they were sentenced to three years' rigorous imprisonment which was to come into effect in case their sentence under S. 302/34 was set aside. The appellant Naga

Kahar was also sentenced to transportation for life under S. 302/34 and to three years' rigorous imprisonment under S. 148, Penal Code, this sentence to come into effect if the sentence under S. 302/34, were to be set aside. The appellants Farhat Hussain and Mohammad Hussain were sentenced to transportation for life under S. 302/149, Penal Code and they were also sentenced to two years' rigorous imprisonment under S. 147, Penal Code. This sentence was to come into effect if the sentence of transportation for life under S. 302/149 were to be set aside. Along with the appeal the reference made by the learned Judicial Commissioner for the confirmation of the sentence of death on Jugeshwar Bux Rai has been heard.

[2] According to the prosecution somewhere about 2-30 or 3 A. M. on 28th December 1944, a large mob led by the appellant Jugeshwar Bux Rai attacked the house of one Bissesswar Kahar. In that house were staying some 12 men belonging to one Ramautar Singh. Two men, Rajnarain Singh and Ram Ekbal Singh, were sleeping in an inner room of this house and ten men were sleeping in a verandah or *dhaba* according to the evidence. The rioters came with various weapons, such as swords, *bhalas*, *lathis* etc., and in the course of the attack on this house they murdered two men Maheshwar Dubey and Dasrath Singh. They also inflicted various injuries on Deonandan Sahu alias Pokhan Sahu, Mathura Singh, Raman Singh, Abdul Majid alias Dillu Khan, Ramji alias Uchit Pandey, Madan Singh, Rajdeo Singh and Dipan Dusadh. There was also an injury found on the person of Rajnarain Singh, but I think it is nobody's case that that injury was caused as a result of any assault upon him. The medical evidence of the injuries on these persons indicates that some of them, at any rate, received slight injuries while some received severer injuries. As for the injuries on the two dead men, the description of these injuries given by the Civil Surgeon who held the post-mortem discloses that they were more or less butchered. Maheshwar Dubey had no less than ten incised injuries and it is noticeable that there does not appear to have been any injury inflicted by a blunt weapon. The injuries on Dasrath Singh were three incised wounds and having regard to the nature of these injuries, it is not surprising that the man died. Rajnarain Singh is the first informant in the case and according to him at about 2-30 in the

morning some 300 persons armed with *lathis*, *bhalas* and *garasas* came to the house of Bissesswar Kahar which he had taken on rent. It may be mentioned that Rajnarain Singh is the tahsildar of Ramautar Singh. While he was inside the room which has been marked as No. 5 on the map, he was able to peep through a small opening in the door leaves and his case is that Jugeshwar Bux Rai alias Tuti Babu was ordering that the 'rascal Baboos' also should be assaulted, whereupon some of the rioters began to push against the door of the room. He climbed on a *machan* and on removing the tiles of the roof he was able to get on top of it and from there saw some 300 men amongst whom he recognised Jugeshwar Bux Rai, Farhat Hussain, Inderdeo Singh, father's name not indicated, Mohammad Mia, Bircha Singh and Rambadan Pahalwan and that these men were beating the people, while Tuti Babu was standing giving orders having some black article in his hand. According to Rajnarain at about 4 A. M. the mob went away. He got down from the roof and hid himself inside the room until about 5 A. M. He then came out of the room and found Maheshwar Dubey and Dasrath Singh lying dead in the verandah with injuries which according to him were caused by *bhala*. He stated in the first information that he could not proceed to the police station to lodge information out of fear. He then began to search for his people and at about 8 A. M. Pokhan Sahu of Mohullia came, with an injury above his eye, and told him that the other persons were alive, but injured and were at Jaipur. He then went to Jaipur and found Raman Singh, Dipan Majhi, Uchit Tewari, Mathura Singh, Madan Singh, Ragho Singh and Dillu Khan injured. In the first information he proceeds to give some description of the various articles said to have been removed by the rioters. He was not able to state in the first information as to who had assaulted whom and with what weapon. Just before ending his first information, he added that he had recognised Naga Kahar also as amongst the rioters. This occurrence took place in village Nawa within the jurisdiction of police station Patna.

[3] Before dealing with the various submissions made before us, it is necessary to state briefly the personalities concerned. Jugeshwar Bux Rai is the uncle of one Gopal Bux Rai and although the latter is for the moment regarded as the owner of the Deogan estate, the real individual who

manages the affairs of the estate is the appellant Jugeshwar Bux Rai. According to the prosecution Jugeshwar Bux is the head of the party which favours the claim of Gopal Bux Rai. There was a dispute sometime back regarding the ownership of the Deogan estate and after the Privy Council decision it must be accepted that for the present at any rate Gopal Bux is the owner of the estate. The dispute arose in the following way. One Surendra Bux Rai, the undisputed owner of the Deogan estate, some years ago committed suicide leaving behind a widow, a daughter and a mother. The mother's name is Mt. Jamuna Kuar alias Rajmata. Throughout the case she is described as the Rajmata. She asserted that one Nand Kishore Bux Rai was the posthumous son of Surendra Bux Rai and therefore the real owner of the Deogan estate. Gopal Bux Rai's contention, however, was that Surendra Bux Rai left no son and that Nand Kishore Bux Rai was not his son. In the litigation between Gopal Bux and the Rajmata the question as to what were the rights of the daughter of Surendra Bux Rai was specifically left open. We are really not very much concerned in this case as to what are the merits of the dispute concerning the ownership of the Deogan estate, for it is perfectly clear that the Rajmata was the holder of a tenure in some villages of the estate including the village Nawa where the occurrence took place. It may, however, be stated that the daughter of Surendra Bux Rai, Mt. Sham Sundari Kumari, did in fact file a suit in 1943 claiming the entire Deogan estate. This lady was married to Ramautar Singh sometime in 1943 and she was the second wife, Ramautar Singh having a wife by an earlier marriage by the name of Mt. Bedbati Debi. Gopal Bux Rai obtained a decree for costs against the Rajmata and in execution of it a Receiver was appointed with reference to the tenure held by her. She ultimately came into possession of her tenure in 1943.

[3a] In the suit which was filed by Mt. Sham Sundari Kumari, Ramautar Singh took steps to have a Receiver appointed in the suit on the allegations of mismanagement and waste on the part of Gopal Bux Rai. This application was dismissed and it is said that Ram Kripal Singh the manager of Ramautar Singh had gone to Patna to file a miscellaneous appeal against that decision. There was a S. 107, Criminal P. C. proceeding sometime in 1943 at the

instance of Ramautar Singh against Gopal Bux Rai's party with reference to dispute about the *bakasht* and *zirat* lands within the tenure of the Rajmata. The application, however, was dismissed and the proceedings ended by a refusal on the part of the Magistrate to bind the members of Gopal Bux Rai's party. It is said, however, that either in June or July 1944 Ramautar's party had begun to cultivate the *bakhasht* and *zirat* lands and this was opposed by Jugeshwar Bux Rai's faction. I should state here that in June 1944 the Rajmata gave a lease of village Nawa and another village at a rental of Rs. 1400 to Mt. Bedbati Debi wife of Ramautar. There was a S. 144-proceeding with reference to the *bakasht* and *zirat* lands, but it went against the lessees who were prohibited from cultivating the *bakasht* and *zirat* lands. It is asserted, however, on behalf of the prosecution that for the time being Ramautar Singh decided to give up cultivation of the *bakasht* and *zirat* lands and to abide by the order made under S. 144, Criminal P.C. It would appear that in November 1944 Ramautar Singh actually deposited a sum of Rs. 1200 under S. 83, T. P. Act, in order that Tuti Babu may be compelled to withdraw this sum of money and redeem the *rehan* which Tuti Babu claimed he had over the lands in question. It will be seen, therefore, that the Rajmata and Ramautar Singh were in very close association in opposing the claims of Gopal Bux Rai or his uncle Jugeshwar Bux Rai. Ramautar Singh is alleged to have extensive business in Assam and himself is a resident of Shahabad district. He has some houses in Daltongunj and it was not till early in December that any attempt was made by him or his servants to establish any headquarters in village Nawa, the place where Jugeshwar Bux Rai has his *garh*. Whatever the dispute may have been with reference to the *bakasht* and *zirat* lands, the right to collect rent, *prima facie*, would appear to be with the Rajmata and her lessee Mt. Bedbati Debi and when in October the time approached to collect rents with reference to the *bhadai* crop, Ramautar's servants seem to have established their headquarters at village Jaipur in the *dalan* of the Jaipur Babus, namely, Rajkishore Bux Rai and his family. There would appear, however, to have been opposition on behalf of Gopal Bux Rai to Ram Kripal Singh the manager of Ramautar Singh collecting rents from tenants for it appears that

Dharamjit Kahar a servant of Mt. Bedbati filed a complaint on 30th October 1944 with reference to an occurrence on the 28th of that month. According to Dharamjit Kahar he went to village Nawa to make collection of rent from tenants when the servants of Gopal Bux Rai forbade him from doing so and on his saying that they should speak to the manager, he was caught hold of and taken to the *garh* where he was wrongfully confined and assaulted and ultimately made to spit and lick up his spit. Whatever the merits of this complaint may be there is certainly an assertion by Dharamjit Kahar that Gopal Bux Rai's servants were prohibiting him from collecting rents in village Nawa. As to Dharamjit Kahar it may be stated that he belongs to the family of Bissesswar Kahar father of Bhrigu Kahar and it is apparent from the record that Dharamjit and Bhrigu are unfriendly to Gopal Bux Rai and his family. It is also in the house of Bissesswar Kahar that ultimately Ramautar Singh established his manager Ram Kripal Singh, his tahshildar Rajnarain Singh and some ten peons. I have already mentioned the name of Rajkishore Bux Rai. He appears to be an agnate of Gopal Bux Rai, but the record indicates that he is unfriendly to Gopal Bux and his family. Details of the various proceedings and cases in connection with these various personalities that I have so far referred to will be given in due course; but it is important to remember that Ramautar Singh by virtue of his marriage to Mt. Sham Sundari Kumari and the lease of village Nawa in the name of his first wife Mt. Bedbati Debi has virtually become the individual who is putting up resistance to Gopal Bux and his uncle Jugeshwar Bux. In the dispute between them, it would appear, that Dharamjit and Bhrigu Kahar have been siding with Ramautar Singh. It would also appear that Rajkishore Bux Rai was giving assistance to Ramautar Singh by allowing his *dalan* to be used as the headquarters of Ram Kripal Singh the manager, from where attempts were being made to realize rents from the tenants of Nawa. Rajkishore Bux also has a *mulazim* by the name of Jagarnath Singh. It is this man who accompanied Rajnarain Singh to the police station when the first information was lodged.

[4] The details of the circumstances disclosing unfriendly relations between Rajkishore Bux and the family of Gopal Bux Rai may be shortly stated. In the first place, the fact that he gave accommo-

dation to Ramautar's servants in his *dalan* at Jaipur when the dispute between Ramautar Singh and Gopal Bux Rai's family was on must have been the result of some ill-feeling on the part of Rajkishore Bux against Gopal Bux Rai and his family. This act of Rajkishore must have been interpreted by Gopal Bux Rai and Jugeshwar Bux Rai as nothing short of encouragement to Ramautar Singh to collect rents from village Nawa. In the month of December there was a theft in the house of Rajkishore Bux at Jaipur and Jagarnath Singh alleged in the first information report, against unknown persons, that he suspected the servants of Jugeshwar Bux Rai, namely, Bircha Singh, Dhundh Kahar, Nagar Kahar, Baisakhia and others. Jaipur is about a mile from village Nawa. It appears that there are *hats* held in both the villages. At Nawa they are held on Tuesdays and at Jaipur on Saturdays. In either October or November Gopal Bux Rai's party, however, began to start a market on Saturdays also and it would appear that an application on behalf of the Jaipur Babus under S. 144, Criminal P. C., was made but dropped. These incidents clearly indicate, to my mind, that for some reason or another Rajkishore was hostile to Gopal Bux and his uncle Jugeshwar Bux Rai, and was helping Ramautar against them.

[5] I have referred to the complaint filed by Dharamjit Kahar on 30th October, namely, Ex. 4. Dharamjit had named Inderdeo Singh, Birchha Singh, Kirta Singh and Balkesh Singh as accused in that case and his witnesses were Ram Kripal Singh, Bhrigu Kahar and others. Bhrigu Kahar nephew of Dharamjit Kahar filed a complaint on 28th November 1944, Ex. 17, regarding assault upon him and the taking away of his paddy. He accused Jugeshwar Bux Rai, Muhammad Hussain, Ramju Mian, Inderdeo Singh, Birchha Singh, Farahat Hussain, Rambirich Singh, Lalji, Rambadan Singh and some 40 other persons as being responsible for the theft of his paddy and assault and riot. In this he named as one of his witnesses Pokhan Sah, a prosecution witness in the present trial, said to be a peon of Ramautar Singh. In December 1944, Bhrigu Kahar filed a petition Exhibit 15 against Jugeshwar Bux and several others. In this petition he sets out a number of matters on which he relies showing how helpless he was and how determined Jugeshwar Bux Rai was in acting in a high-handed manner towards him and he prays that the persons named may be called upon

to execute a bond for keeping the peace. I think it is clear from these exhibits that Dharamjit and Bhrigu were certainly hostile to Jugeshwar Bux Rai and that at least Ram Kripal and Pokhan were witnesses for them against Jugeshwar Bux Rai and his men.

[6] On 6th December 1944, Ram Kripal filed an application under S. 107, Criminal P. C., against Jugeshwar Bux Rai, his two sons Megha Bux Rai and Tipu Bux Rai, Balkesh Singh, Birchha Singh, Kirta Singh and Inderdeo Singh. It is quite beside the point for the purposes of this case to determine as to whether the various allegations made in these various complaints and petitions were true or not. It is patent, however, that the conduct of the complainants in these various cases indicates existence of enmity with the persons complained against.

[7] I have already indicated that the headquarters of Ramautar Singh was in the *dalan* of the Jaipur Babus at Jaipur and that at that time the strength of Ramautar's servants according to the evidence was not much more than five. Indeed the learned Judicial Commissioner refers to a petition of Ram Kripal Singh himself of 5th December where he speaks of having only five peons with him. In early December, date unknown, Ramautar's manager Ram Kripal Singh transferred his headquarters to the house of Bissesswar Kahar in village Nawa and the strength of the peons of his master more than doubled itself. It is also clear from the evidence that most of these peons stationed at Nawa were men imported from other villages and some of them from other districts. The rapid strengthening of the number of peons employed by Ram Kripal when living in Nawa in the house of Bissesswar Kahar may have been either due to an apprehension that his presence in Nawa may be dangerous and that he should be prepared to defend himself or it may have been for the purpose of making collection of rents by means of force or it may have been that having advanced into Nawa itself Ramautar Singh may have still had an eye on the *bakasht* and *zirat* lands which he apparently seems to have given up so meekly so far as the criminal Courts are concerned. Whatever the reason, it is a remarkable circumstance that the strength of Ramautar's servants in village Nawa had more than doubled itself within a very short time and we cannot altogether overlook the allegation of Dharamjit Kahar in his complaint of 30th October 1944 while Ramautar's headquarters

were still at Jaipur that the servants of Gopal Bux Rai were prohibiting them from collecting rents from tenants of Nawa.

[8] I have given these various details in order to present the background and the atmosphere prevailing in the locality at the time when the occurrence took place. No one can possibly doubt in this case that an occurrence of a very serious nature took place in village Nawa and that in course of it two men were brutally murdered without any excuse or justification whatever. The circumstances found by the police, namely, blood in the *dhaba* and the marks on the walls and the two dead bodies either in the *dhaba* or just outside it convince me that the place of occurrence was undoubtedly the house of Bissesswar and if I have understood the submissions of the learned counsel for the appellants, I do not think he ever questioned that. I have also examined the circumstances to find out for myself as to whether the occurrence which took place at night after midnight of 27th December and the early hours of 28th December could possibly have been an attack by dacoits and unknown people and that the enemies of Jugeshwar Bux Rai took the opportunity to convert what was a dacoity into a determined attack to drive Ramautar's men from village Nawa. There is, to my mind, nothing on the record to show that there was anything worth attacking or taking away so far as the dacoits were concerned. There is also nothing on the record to indicate that any one other than Jugeshwar and his party is on hostile terms with Ramautar and his party and it would seem to me that in all likelihood the attack on Bissesswar's house was by persons who were interested in Jugeshwar. Indeed the most important question to be determined in this appeal is the question of identification. While determining as to how far the witnesses are to be relied, I think one cannot keep out of mind having regard to the enmity which existed in this case, the possibility of witnesses naming obvious names as persons who had taken part in the occurrence. (After considering the evidence and coming to the conclusion that it was unsafe to rely upon the evidence of identifying witnesses and the test identification parade his Lordship proceeded.)

[9] Having given the case my serious consideration and giving full weight to the arguments made on behalf of the prosecution, I feel that I must decline to uphold the convictions and I would accordingly allow the appeal, set aside the convictions

and sentences passed on the appellants and discharge the reference.

[10] Before I close this judgment I would like to say a few words on the procedure adopted by the defence in filing some documents along with the written statement. Section 256 (2), Criminal P. C., states that if the accused puts in any written statement the Magistrate shall file it with the record. I do think that when a written statement is put in on behalf of the defence a Court should give due consideration to it, but it does not necessarily follow that everything stated therein is necessarily legal evidence, and where documents which require to be specifically proved before they can be taken into evidence are filed along with such a written statement the danger is that much of what may otherwise be inadmissible is necessarily brought to the notice of the Court. In this particular case, however, it has not made any difference to the result whether it ended in the manner before the learned Judicial Commissioner or in this Court. Indeed learned counsel for the appellants scarcely made any reference to those documents. My attention was drawn to a case reported in A.I.R. 1928 Mad. 1135¹ where actually a conviction was set aside and a retrial ordered where the Court had declined to consider documents filed along with the written statement as they had not been exhibited in the case and remained unproved and with great respect to the learned Judge I do not think that one could go as far as he did in setting aside a conviction merely on the ground that the documents filed along with the written statement had not been considered. There may be circumstances where the documents are put in which require no formal proof or documents which may be admitted by both sides in which case the Court may be justified in referring to them; but documents which are undoubtedly inadmissible until formally proved need not, in my judgment, be considered by a Court whether filed with a written statement or otherwise unless duly proved.

[11] **Beavor J.**—I agree that this appeal should be allowed and the convictions and sentences set aside and the reference discharged. I have no doubt that on the night of occurrence an attack was made by a number of men on behalf of Jugeshwar Bux Rai alias Tuti Babu against the house in which Rajnarain Singh and Ram Ekbal Singh were sleeping. The fact that no serious attempt

1. ('28) 15 A.I.R. 1928 Mad. 1135 : 112 I. C. 465, Muhammad Salia Rowther v. Emperor.

seems to have been made to break open the door of the room in which they were sleeping, and the fact that the two peons, who were the stoutest and strongest, were killed receiving a number of incised wounds while the remaining peons escaped with comparatively minor injuries, including 'not more than one incised wound, suggests to my mind that the primary object of the attack was not to kill, or even to cause serious injury to any person, but to produce a demonstration, and cause the representatives of Ram Kripal Singh such a fright that they would abandon all intention of living longer in this village. It seems to my mind probable that the two peons who met their death put up a somewhat unexpected resistance, and it was only then that sharp weapons were brought into action.

[12] The mere fact, however, that serious riot occurred in which two men were killed does not justify the conviction of any person. In this case I agree with my learned brother that the evidence on record is not of a character which could establish beyond reasonable doubt that any one of the appellants took part in that occurrence. If Rajnarain Singh could be regarded as an honest witness I should hesitate long before holding that what he claimed to have seen either through the slit in the door or from the top of the roof was physically impossible. I doubt whether much advantage would have accrued from a careful measurement of the slit in the door by the Inspector. In my experience arguments drawn from such measurements to the possibility of seeing or recognising persons or objects in any given position outside usually prove fallacious. It would, I think, perhaps have been more useful had the Inspector made a careful note and stated in evidence how far and in what direction it was possible to see through that slit in the door. I would also not like to lay down any general rule as to the possibility of any man recognising some person at night by his voice. But in the present case I cannot regard Rajnarain Singh as an honest witness at all. In my opinion the whole of his evidence, when taken in conjunction with the evidence of other witnesses and the surrounding circumstances, shows that from the time of the occurrence to the time he lodged the first information report at the police station at noon on the day following the occurrence he was making no genuine attempt to ensure that those who had really taken part in the occurrence were brought quickly and effectively to jus-

tice. In my opinion his whole conduct shows that he was leaving the door open as wide as possible for later manipulation of the evidence, with a view to securing freedom of action for any witnesses who sought to implicate any persons whom it was thought desirable, irrespective of the truth of such accusations.

[13] The conduct of Ram Ekbal Singh also appears to me to call for condemnation. He was the cousin of Ram Kripal Singh, the manager, who was away on the night of occurrence, and even if his story that Raj Narain Singh told him nothing that night about the identity of the attackers is true, I think it is quite clear that he was making no attempt to see that justice followed the crime which had been committed but was disassociating himself from all responsibility in that connection. Such witnesses as Bhirgu Ram and the peons can hardly be expected to make a stand for truth if men like Raj Narain Singh and Ram Ekbal Singh, who are their superiors in education and social status, if not in moral worth, were setting a bad example. In my opinion it is largely owing to the dishonest and tricky conduct of Rajnarain Singh and Ram Ekbal Singh that it has been impossible to secure justice against the murderers of Maheshwar Dubey and Darrath Singh, and I wish I could believe that they are capable of recognising even partially the extent of the shame which attaches to them for such conduct.

[14] As regards the documents which were filed with the written statements in this case, I should like to add a few words. Such documents were filed with more than one written statement, but I will confine myself to the written statement filed on behalf of Jugeshwar Bux Rai alias Tuti Babu and two others. In para. 5 of that written statement it is stated :

[15] "That Biseswar, Dharamjit and Bhirgu have been hostile to these accused as Jagdish Kahar their relative sold his share of the ancestral lands to Dhundh Kahar and the latter sold the same to the daughter-in-law of accused 1 (Tuti Babu) who took possession of the land. Bhirgu and others have been bringing false cases against these accused and their servants due to enmity. The two sale deeds are attached with this petition as a part of written statement for reference."

[16] The two documents filed with this written statement consist of two registered documents, one purporting to be a sale deed by one Jagdish Ram in favour of Dhundh Ram dated 23rd May 1941 and the other purporting to be a sale deed by Dhundh

Ram to Sm. Mundranath Kuer dated 18th January 1944. Now, it seems to me clear that these documents could, in no circumstances, whatsoever be treated as any part of any statement of any of these accused whether written or otherwise. The documents are statements of the persons who executed them, if of any body. The only relevance of such documents in the present case would be to establish the truth of the statements made in para. 5 of the written statement to which I have just referred. That is the function of evidence.

[17] Under S. 3, Evidence Act, "evidence" means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry; such statements are called oral evidence, and (2) all documents produced for the inspection of the Court; such documents are called documentary evidence. A written statement filed on behalf of an accused is not a statement made by a witness nor I think can it be treated as a document produced for the inspection of the Court. Under S. 61, Evidence Act, the contents of documents may be proved either by primary or secondary evidence and under S. 62 primary evidence means documents themselves produced for the inspection of the Court. Section 67, however, requires that if a document is alleged to have been signed or to have been written wholly or in part by any person the signature or handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. The two sale deeds now in question were alleged to be signed or executed by Jagdish Ram and Dhundh Ram respectively and, therefore, before those documents could be taken in evidence it was necessary to prove their execution by those persons. There was no evidence to prove such execution. I do not think it is necessary to decide whether in any circumstances it is possible to regard the statements of an accused in his written statement as proving the handwriting or the signature of any document tendered in evidence for the defence. I think it is sufficient to note that in my opinion it would be only in exceptional circumstances that the Court would be justified in adopting such a course; because ordinarily evidence would be available to prove such signature or execution, and the statement of the accused, even though the Court may consider it, is not strictly evidence, and it would be open to

the Court, if the defence failed to produce the evidence which was available to prove execution of such documents, to draw the presumption that such evidence, if produced, would have been unfavourable to the defence.

[18] As regards the decision of Devadoss J. of the Madras High Court reported in A. I. R. 1928 Mad. 1135,¹ it is unfortunate that the judgment reported is very brief so that it does not show what were the facts in issue in that case. It is, therefore, impossible to know from the report how the documents which were filed with the written statement in that case would have been relevant. There were four documents. One of them was a telegram which purported to have been sent by accused 1 to accused 2 on 1st April 1926; another is a receipt for 12 annas for the cost of the telegram; the third was a post-card said to have been written by accused 2 to accused 1 in reply to the telegram on 1st April 1926 from Madura; and the fourth was a railway ticket from Egmore to Madura, dated 4th April 1926. Items 2 and 4 would appear to have been documents which required no evidence to prove them, and even document No. 1 might perhaps have been admissible for a limited purpose without proof though S. 88, Evidence Act, would prohibit the Court from drawing any presumption as to the person by whom that telegram was sent. I think that there is a certain confusion in the use of the word "consider" in the judgment of Devadoss J. where he says: "The Court is bound to consider the document along with his statement." In one sense the Court is bound to consider any document which is tendered before the Court for the purpose of being admitted in evidence, but that is a different thing from considering it as evidence. If that distinction is kept in mind I think it will be clear that documents should not be tendered with the written statement, but should be tendered separately for admission in evidence and it will then be open to the Court to decide whether such documents require proof before they can be admitted in evidence, but the Court should not accept other documents as part of the written statement.

[19] I notice that S. 256 (2), Criminal P. C., which directs that if the accused puts in any written statement the Magistrate shall file it with the record, appears in the chapter relating to the trial of warrant cases, but I have no doubt that this provision is actually applicable in sessions cases,

as such written statements have always been admitted so far as I know. But I notice that S. 292, which appears in the chapter dealing with proceedings in trials before High Courts and the Courts of Session, lays down that the prosecutor shall be entitled to reply in certain cases including "(c) with the permission of the Court when any document which does not need to be proved is produced by any accused person after he enters in his defence." This, I think, clearly shows that documents which do require proof are not to be admitted until they have been proved, that is to say, normally proved by evidence.

[20] Although I have stated that in my opinion, it is quite improper for any Magistrate or Sessions Judge to admit extraneous documents as part of the accused's written statement, I do not intend to lay down any rules as to when he is justified in accepting documents in evidence for the defence with or without separate evidence to prove them.

G.M./D.H.

Appeal allowed.

[Case No. 127.]

A. I. R. (33) 1946 Patna 381

DAS AND PANDE JJ.

Ram Babu and others — Petitioners

v.

Emperor.

Criminal Revn. No. 1103 of 1945, Decided on 12th December 1945, from order of Judicial Commissioner, Chota Nagpur, D/- 8th June 1945.

(a) Penal Code (1860), S. 141, cl. (2)—Group of processionists defying order under S. 30, Police Act constitutes unlawful assembly within cl. (2).

The organiser of a procession had obtained a license under S. 30, Police Act, which prescribed the route and limit up to which the procession had been allowed to proceed. In spite of the directions issued by the Magistrate and police not to do so, a group of the processionists, after previous consultation, apparently resolved to disobey the orders and in defiance thereof made a determined effort to break through the police cordon:

Held (Per Pandey J., Das J. doubting) that the group constituted an unlawful assembly under cl. (2) of S. 141 though not under cl. (3). The order issued by the police was the execution of law which was enacted in S. 30, Police Act and resistance to the conditions laid down in the order issued under the law amounted to resistance to the execution of the law. The case was therefore clearly covered by cl. (2) of S. 141.

[P 383 C 1]

(b) Penal Code (1860), S. 141, cl. (3) — Licence issued under S. 30, Police Act — Assembly defying conditions of licence—Cl. (3) does not apply.

A group of processionists who violate the terms of a licence issued under S. 30, Police Act,

does not constitute an assembly with a common object to commit an offence as the maximum punishment under S. 32, Police Act for violating the terms is a fine of Rs. 200 only. Section 141, cl. (3), therefore, does not apply to such a case.

[P 382 C 2]

(c) Penal Code (1860), S. 141, cls. (4) and (5)—Licence for procession prescribing route and limit — Police cordon to enforce order — Processionists attempting to break through cordon constitute unlawful assembly under cl. (4) or (5).

Per Das J. — Where a licence is issued for taking out a procession and the licence prescribes a limit and a police cordon is formed at the limit, the part of the processionists who attempt to break through the cordon by force in spite of the orders to the contrary constitutes an unlawful assembly either under cl. (4) or cl. (5) of S. 141. [P 384 C 1]

C.P. Sinha and T. K. Prasad—for Petitioners.
Government Pleader—for the Crown.

Pande J. — The three petitioners, Ram Babu, Ram Singhasan Prasad and Girdhari Mistry have been convicted under S. 147, Penal Code, the first two petitioners have been sentenced to rigorous imprisonment for eighteen months each and the third one to rigorous imprisonment for one year. The three petitioners have been concerned in a riot that is said to have taken place in village Bagodar, police station Bagodar in the District of Hazaribagh on 2nd April 1944, which was the day of Ram Navami Hindu festival. Village Bagodar is situated on both sides of the Grand Trunk Road lying between milestones 215 and 216. The Grand Trunk Road runs east to west through the village. There are about four hundred houses of Hindus and one hundred houses of Mahomedans. There is a Mahabir-asthan to the east of the village by the side of the Grand Trunk Road. There is a temple dedicated to goddess Kali, commonly known as Kalimanda, to the west of the Mahabir-asthan, at a distance of about 150 paces by the side of the Grand Trunk Road. Further west at about 50 paces from the Kalimanda on the Grand Trunk Road there is a culvert. About the culvert there is a big Simal tree. A mosque stands about hundred paces west of Kalimanda. In front of the Kalimanda there is a Siris tree. Further west to the mosque is another Mahabir-asthan in village Manjhladih.

For some years past, there has been communal tension between the Hindus and Mahomedans of the locality. In 1944 Ram Babu obtained a license from the police for taking out Ram Navami procession on 2nd April 1944. The license specified the hours for the procession and further directed that the processionists could go from Mahabir-

asthan in mouza Bagodar to Kalimanda within the same mouza. The authorities had taken precautionary measures against any trouble that might possibly arise on account of prevailing communal feeling in the locality. A Magistrate with ten armed constables, one Havildar and the Sub-Inspector of Police were posted, to guard against any possible attempt of the processionists to pass beyond the prescribed limit, to avoid any conflict between Hindus and Mahomedans. The armed constables were drawn up in a cordon near about the culvert and the Magistrate and the Sub-Inspector, Police, of Bagodar were also there. When the procession reached Kalimanda, the assembly attempted to proceed beyond the prescribed limit. While they had proceeded onward and approached near the culvert they were pushed back by the Sub-Inspector under the orders of the Magistrate. The processionists retreated, some went back to their houses, apparently in resentment, taking away the flags, some were showing their faces near the Kalimandas while some other were discussing there what to do. After some consultations some members of the assembly tried to push beyond the culvert but they were again pushed back by the Sub-Inspector under the orders of the Magistrate. At this stage, it is said, one member of the group, Kunj Lal, hit the Sub-Inspector on his wrist with a *lathi*. Kunj Lal was arrested immediately. The Sub-Inspector, while engaged in pushing back the crowd, got mixed up in it and a confusion followed upon some people pelting brickbats and stones lying about the road sides. Apparently the Sub-Inspector finding himself in danger, or apprehending danger, ran to the house of one Haricharan Lohar for safety where he concealed himself and bolted the door from inside. It is said that some members of the mob surrounded the house. One constable reported to the Magistrate that the Sub-Inspector's life was in danger. The Magistrate deputed four constables with the Havildar for the protection of the Sub-Inspector with instructions to warn the mob to disperse and in case of their refusal to disperse the mob by firing, if necessary. The Havildar and the constables eventually fired on the mob with the result that three men died at the spot and two others died later in the hospital and several men received gunshot injuries. After investigation forty men were put on trial on various charges. The Magistrate convicted twenty

of them under S. 147, Penal Code and also under S. 353/149, Penal Code and one was convicted under S. 32, Police Act, and sentenced to a fine of Rs. 30 only. Of the twenty men who were sentenced under S. 147, Penal Code, eighteen were sentenced to rigorous imprisonment for one year each and two, namely, Ram Babu and Ram Singhasan, to rigorous imprisonment for eighteen months each. No separate sentence was passed under S. 353, Penal Code or S. 353/149, Penal Code. On appeal the learned Judicial Commissioner of Ranchi set aside the conviction under S. 353/149, Penal Code and affirmed the conviction and sentence against four and acquitted the remaining sixteen men. Those four men came up in revision before this Court against the orders of the Courts below. The application of one of them was rejected and rule was issued in the case of the three petitioners before us.

The learned advocate for the petitioners contended that on the facts found by the Courts below the only offence for which the petitioners may at best be liable is of violation of the terms of the license in attempting to proceed beyond the prescribed limit for which they may be liable to punishment under S. 32, Police Act, which prescribes the maximum punishment of fine of Rs. 200 only; while under S. 141, Penal Code, an assembly of five or more persons is designated as an unlawful assembly, if the common object of the persons composing that assembly is, among other matters prescribed in the section, to commit an "offence." Reference is made to S. 40, Penal Code, which provides that the word offence in S. 141 refers to acts punishable under the special or local law with imprisonment for a term of six months or upwards with or without fine. It is, therefore, argued that the petitioners merely for violating the terms of the license cannot be said in law to be members of an unlawful assembly, and, therefore, their conviction under S. 147, Penal Code, is bad in law.

It may be conceded that the members of the assembly did not constitute an "unlawful assembly" with the common object to commit an "offence" according to cl. (3) of S. 141, Penal Code. But there are other clauses to the section and on the evidence which I shall refer presently, the case seems clearly to fall under cl. (2) of the section which runs thus :

"An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is . .

... Second—to resist the execution of any law, or of any legal process.”

It has been found by the learned Judicial Commissioner that the processionists attempted twice to proceed beyond the police cordon. In the first attempt they were pushed back and they readily obeyed the order without any resistance. But after some consultations at the Kalimanda, some members of the procession made a fresh attempt to proceed beyond the cordon, in spite of the orders of the competent authorities not to do so, and, therefore, the group of men who made the second attempt to break through the cordon and had to be pushed back a second time, constituted an unlawful assembly within the meaning of S. 141, Penal Code. The view taken by the learned Judicial Commissioner finds support from a decision of a Special Bench of this Court in 2 Pat. 134¹ and a Division Bench decision of the Madras High Court in 54 Mad. 1025.² In those cases a procession had been taken out in defiance of orders under S. 31 (2), Police Act and in spite of warnings to desist from doing so, some members of the procession persisted in disobeying the orders. In the present case the organiser of the procession had, no doubt, obtained a license but they violated the conditions of the license which prescribed the route and the limit up to which the procession was permitted to proceed, and on being directed by the police and the Magistrate not to do so, a group of men of the procession, after consultation at a meeting, apparently resolved to disobey the orders, and in defiance of the order, actually made a determined effort to break through police cordon. This act of that group of the processionists who so acted was clearly an overt act amounting to resistance to the execution of the law.

The law is enacted in S. 30, Police Act. The issuing of the order by the police is the execution of that law. Resistance to the conditions set out in the order issued under the law is resistance to the execution of the law. Therefore that case is clearly governed by cl. (2) to S. 141, Penal Code. In 2 Pat. 134¹ the majority view is thus expressed :

“When a notification is issued by an executive authority in exercise of a power conferred by statute, that notification is as much a part of the law as if it had been incorporated in the body of the statute at the time of its enactment. The command is in

1. (‘23) 10 A. I. R. 1923 Pat. 1 : 2 Pat. 134 : 68 I. C. 945 (S. B.), Emperor v. Abdul Hamid.

2. (‘31) 18 A. I. R. 1931 Mad. 484:54 Mad. 1025: 131 I. C. 844, Public Prosecutor v. Satya Narayana.

effect a command by the appropriate legislative authority. In the present case if the notification was in compliance with S. 30, Police Act, then, in my opinion, it was a law and certainly a legal process.”

The prosecution case is that the petitioners resisted the execution of the law, namely, defiant violation of the conditions of the license, in spite of definite prohibition by the Magistrate and the police posted at the cordon to enforce compliance with the conditions of the license. These officers were there to ensure due execution of the orders made under the law as laid down in S. 30, Police Act and the determined disobedience of their orders was clearly an overt act amounting to resistance to the execution of the law. In 54 Mad. 1025² their Lordships Sir Owen Beasley C. J. and Cornish J. observed :

“If the police order, not to direct a procession without a license, is the execution of the law, then clearly the direction of the procession, after such an order or after the respondents became aware of such an order, amounts to resistance of the execution of the law.”

The above principle applied with equal force to disobedience of the orders of competent authorities posted at the spot to enforce compliance with the conditions of license under S. 30, Police Act. Therefore the group of the processionists who attempted to push beyond the cordon in defiance of the police orders are liable for the offence under S. 143, Penal Code. It has further been found that one of the members of that group of processionists used force in assaulting the Sub-Inspector with a *lathi*. Therefore such of the members of the procession who were in that group are guilty of the offence under S. 147, Penal Code.

There remains the question whether the three petitioners were in that group. (His Lordship then discussed the evidence and came to the conclusion that only the petitioner Ram Babu was in the group while the other two were not and proceeded further.) Therefore the conviction of these two petitioners must be set aside and the conviction of Ram Babu must be affirmed.

The learned advocate submitted that the sentence of eighteen months' rigorous imprisonment is too severe and it should be reduced to the period already undergone which it is stated has been about six months. But Ram Babu was the leader of the processionists and it was at his exhortation that some of the members of the procession made a second attempt to push beyond the police cordon. The force used by the unlawful assembly was, however, very slight. Having regard

to these circumstances I consider that a sentence of rigorous imprisonment for one year is quite adequate to meet the ends of justice. The sentence is reduced accordingly. With this modification in the sentence Ram Babu's petition is dismissed.

I would allow the petitions of Girdhari Mistry and Ram Singhasan Prasad, set aside the convictions and sentences passed against them and direct that they be set at liberty.

Das J. — I agree; but I would like to add that I have some doubt if cl. (2) of S. 141, Penal Code would apply in the present case. Both 2 Pat. 134¹ and 54 Mad. 1025² were cases in which a procession was taken out in defiance of a notice under S. 30, Police Act, prohibiting any processions etc., and in spite of warnings to desist from doing so. The *ratio decidendi* was that a notification issued by an executive authority in exercise of a power conferred by statute is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment. The present case is not a case of taking out a procession in defiance of a notice under S. 30, Police Act.

I am, however, satisfied on the facts of this case that that part of the procession which tried to break through the police cordon by force in spite of orders to the contrary, constituted an unlawful assembly either under the fourth or fifth clause of S. 141, Penal Code.

G.B.S./D.H.

Order accordingly.

[Case No. 128.]

A. I. R. (33) 1946 Patna 384

SHEARER J.

Srikishun Jhunjhunwalla—Petitioner
v.

Emperor.

Criminal Revn. No. 21 of 1946, Decided on 27th February 1946, from order of Addl. Sessions Judge, Saran, D/-27th September 1945.

(a) Evidence Act (1872), S. 33—Applicability — Witness dying before cross-examination—Degree of weight to be attached to his evidence depends on circumstances.

Where a witness dies after examination-in-chief and before cross-examination, his evidence is admissible but the degree of weight to be attached to it depends on the circumstances of the case. Section 33 does not apply in such a case: ('44) 31 A. I. R. 1944 All. 188 and ('36) 23 A. I. R. 1936 Pat. 34, *Rel. on*; ('28) 15 A. I. R. 1928 All. 140, *Disting.* [P 385 C 1]

(b) Evidence Act (1872), S. 33—Death of witness after examination-in-chief but before cross-examination—Proof of, whether necessary.

When a witness is examined-in-chief but on the day fixed for his cross-examination the Court is informed that he is dead it is not incumbent upon the Court to require the proof of the death of the witness in the absence of any suggestion by the other party that he is not in fact dead but for some reason or the other is keeping out of the way.

[P 384 C 2]

Jaleshwar Prasad and Balaram K. Sinha —
for Petitioner.

The Standing Counsel — for the Crown.

Order.—The petitioner, Srikishun Jhunjhunwalla, has been convicted under R. 81 (4), Defence of India Rules and has been sentenced to pay a fine of Rs. 1000, or, in default, to undergo rigorous imprisonment for six weeks. The petitioner is a wholesale dealer in sugar at Gopalganj, and the charge against him was that he had contravened a condition of his licence by selling five bags of sugar to one Sheodhan Sah. Apparently, in the month previous to that in which the sale took place, the petitioner had been authorised by the Sub-divisional Officer to sell six bags of sugar to this Sheodhan Sah. He had, however, been unable for some reason or other to supply, or, at any rate, had not supplied, him with more than two bags. It was apparently conceded in the Courts below that the petitioner would have been justified in supplying Sheodhan Sah with four bags but was not justified in supplying him with five bags. Sheodhan Sah did not take delivery of the bags of sugar himself but sent his servant, one Ramdas, to take delivery. In the morning after Ramdas took delivery, a Sub-Inspector of excise for some reason or other suspected him and seized the bags of sugar. He also seized a receipt which Ramdas said the petitioner had given him when he paid him the money and took delivery of the bags. Ramdas was examined-in-chief, but on the day on which he was to attend for cross-examination, the trying Magistrate was informed that he was dead. Mr. Jaleshwar Prasad for the petitioner has complained that the learned trying Magistrate should have called on the prosecution to adduce evidence to show that Ramdas was in fact dead. If it had been suggested by the defence that he was not dead but for some reason or other was keeping out of the way, the learned trying Magistrate would clearly have been under an obligation to do so. No such suggestion appears, however, to have been made, and, as a matter of law, it was not, I think incumbent on the learned trying Magistrate to insist on evidence of this kind being produced.

[2] Mr. Jaleshwar Prasad then contended that the evidence of Ramdas should have been wholly excluded, and for this contention he relied on the decision in 50 ALL. 113.¹ That, however, was a case in which a woman was examined on commission in a civil suit and at a later stage of the trial it was sought to put in that evidence. The decision has been distinguished and explained in a later decision of the same High Court : A. I. R. 1944 ALL. 188.² As pointed out there, S. 33, Evidence Act, does not apply in this case. In A. I. R. 1944 ALL. 188² it was decided that when a witness died after he had been examined-in-chief and before his cross-examination had been concluded, his evidence was admissible, but the degree of weight to be attached to it depended on the circumstances of the case. Rowland, J. of this Court, in A. I. R. 1936 Pat. 34,³ in which he reviewed a number of authorities, was of the same opinion. Even, however, if the evidence of Ramdas is excluded, there is other evidence sufficient to support the conviction. Ramdas employed one Shaikh Boharan to carry the bags of sugar on his bullock cart to the premises of Sheodhan Sah. This man said that five bags of sugar had been made over to him at the godown, that the petitioner had been present there and that he had seen the petitioner give Ramdas a receipt. As I have already said, there were five bags of sugar on the cart when the sub-inspector of excise stopped it and Ramdas was in possession of the receipt which was produced at the trial. This receipt has obviously been taken from a receipt-book specially printed for the petitioner. No doubt, the petitioner produced a counterfoil purporting to show that he had sold four bags of sugar and not five to Ramdas. It is, however, quite clear, on the evidence, that he did in fact sell five bags of sugar to Ramdas and gave him a receipt; and if the counterfoil which he produced purports to show that he sold only four bags, the conclusion to be drawn is that he was maintaining two books of receipts, giving his customer a receipt from the one book and making a false entry in the counterfoil of the other. Lastly, Mr. Jaleshwar Prasad, for the petitioner, contended that there was no evidence to show that the order permit-

ting the petitioner to sell a certain number of bags of sugar to Sheodhan Sah was made by the Sub-Divisional Officer, who, Mr. Jaleshwar Prasad says, was the licensing authority.

[3] Mr. Jaleshwar Prasad points out that the list which was produced by the prosecution was signed by the Supply Officer, Gopalganj, and not by the Sub-Divisional Officer. It was not suggested to the clerk who produced this list that the allocation of bags of sugar among retailers had not been made or at least approved by the Sub-Divisional Officer. Moreover, it is clear from this man's evidence that retailers cannot obtain sugar from a wholesale dealer without the permission of the Sub-Divisional Officer. In other words, the petitioner's only justification for supplying any bags of sugar at all to Sheodhan Sah was this order which may have been issued under the signature of the Supply Officer but which must, if it was a valid order at all and entitled him to supply any sugar, be assumed to be, as I have no doubt it was, an order made or approved by the Sub-Divisional Officer. In my judgment, there is no merit in this application and it must be dismissed.

G.M./D.H.

Petition dismissed.

[Case No. 129.]

A. I. R. (33) 1946 Patna 385

MANOHAR LALL AND DAS JJ.

Suraj Narain Prasad—Appellant
v.

Jamil Ahmad and another—

Respondents.

Second Appeal No. 104 of 1945, Decided on 10th October 1945, from order of District Judge, Patna, D/- 7th March 1945.

(a) Defence of India Act (1939), S. 14—Bihar House Rent Control Order, 1942, Ss. 13 and 14—Jurisdiction of Civil Court to pass decree for ejectment is not taken away.

There is no provision in any of the sections of the Bihar House Rent Control Order, 1942, which takes away the jurisdiction of the Civil Courts. The only jurisdiction taken away is that the order of the Controller when made shall be final and shall not be questioned in any Court. The Bihar House Rent Control Order does not create an independent or a new obligation so that it can be held that it provides an exclusive Code for the determination of that obligation. It provides merely an alternative remedy which any party can avail himself of. If the party avails himself of that alternative remedy then and then alone the order of the Controller is final, subject to investigation by Civil Courts. Hence it cannot be said that the effect of S. 14, Defence of India Act, is to take away the jurisdiction of the Civil Court to pass decree for ejectment. [P 387 C 1 ; P 388 C 1]

1. ('28) 15 A. I. R. 1928 All. 140 : 50 All. 113 : 107 I. C. 243, Narsing Das v. Gokul Prasad.

2. ('44) 31 A. I. R. 1944 All. 188 : I. L. R. 1944 All. 241, Ahmad Ali v. Joti Prasad.

3. ('36) 23 A. I. R. 1936 Pat. 34 : 160 I. C. 445, Mt. Horil Kuer v. Rajab Ali.

(b) Jurisdiction—Civil — Exclusion of jurisdiction of Civil Courts must be explicitly expressed or clearly implied.

The exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied and even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of an Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure: ('40) 27 A. I. R. 1940 P. C. 105, *Rel. on.* [P 387 C 1]

(c) Execution—Executing Court, powers of — Jurisdiction of Civil Court not questioned by anybody — Whether executing Court can declare decree invalid.

There is a well-recognised distinction between inherent want of jurisdiction in a Court and want of jurisdiction on grounds which require determination by the Court itself: ('33) 20 A.I.R. 1933 Pat. 104, *Rel. on.* [P 388 C 2]

When the jurisdiction of the Civil Court has not been questioned by anybody the executing Court is only allowed within narrow limits to declare the decree as being invalid. It must be shown that the Civil Court on the face of it had no jurisdiction whether pecuniary or territorial or in respect of the person of the judgment-debtor to make a decree: ('25) 12 A. I. R. 1925 Cal. 907 (F. B.), *Rel. on.* [P 388 C 2]

C. P. C. —

('44) Chitale, S. 38, N. 8.

(d) Jurisdiction—Civil—Suit to enforce right — Onus is on defendant to show that jurisdiction of Civil Court is ousted.

Where a right exists, the presumption is that it can be enforced by a Civil Court and the onus is on the defendant to show that the jurisdiction of the Civil Court is ousted or that some other Court has exclusive jurisdiction to entertain that determination: ('19) 6 A. I. R. 1919 P. C. 233, *Rel. on.* [P 389 C 1]

(e) Bihar House Rent Control Order (1942), S. 13 — Bar of S. 13 must be pleaded in suit and not in execution. (*Per Das J. Obiter.*)

It is not very clear from the wording of S. 13 if the "order for the recovery of possession of any house" referred to therein means an order by the Controller under any of the provisions of the Control Order, or means any order for the recovery of possession of any house passed either by the Civil Court or the Controller. If the section is interpreted in the wider sense, even then the bar of S. 13 must be pleaded in the suit and not in execution. Section 13 does not oust the jurisdiction of the Civil Court. It merely states that unless certain conditions are fulfilled, no order for recovery of possession can be made. Whether these conditions have been fulfilled or not, has to be decided at the trial and cannot be enquired into in execution, for that would be going behind the decree, which the executing Court cannot do. [P 389 C 1]

Sarjoo Prasad and B. P. Mahaseth —

— for Appellant.

M. Rahman — for Respondents.

Manohar Lall J.—The important question for decision in this appeal by the judgment-debtor is whether a Court execu-

ting a decree passed by a civil Court for ejectment of a tenant from a house can declare the decree as null and void in view of the provisions of the Bihar House Rent Control Order, 1942, hereinafter to be called the Control Order. The facts are not in dispute. The respondent-decree-holder is the owner of the house which was let out to the appellant as a tenant. The respondent instituted a suit for recovery of rent for the period February 1942 to August 1942 and obtained a decree on 4th November 1943, at a rental slightly lower than that which was claimed by the plaintiff. During the pendency of the suit the plaintiff served upon the defendant a notice to quit the house—the notice is dated 1st June 1942. The defendant not having vacated the house, another suit was instituted by the plaintiff in which he claimed a decree for ejectment and also arrears of rent and damages for the period after August 1942. That suit was decreed *ex parte* on 27th April 1944. The decree-holder proceeded to execute that decree before the first Subordinate Judge of Patna when an objection was filed by the judgment-debtor under S. 47, Civil P. C., to the effect that the decree for ejectment from the house is not executable as the civil Court has no power to give effect to that decree in view of the provisions of the Control Order read with R. 81, sub-r. 2, cl. (bb), Defence of India Rules.

[2] The learned Subordinate Judge took the view that the Control order does not take away the power of the civil Court to execute a decree for ejectment passed by it in a suit filed by the owner of the house for ejectment of the tenant on the ground that he has wilfully neglected to pay the stipulated rent. It was also contended before the learned Subordinate Judge that it is only the Controller, as defined in S. 2, cl. (b) of the Control Order, who can pass order for recovery of possession of a house by the owner from the tenant, and reliance was placed upon S. 13 of the Control Order which enacts that

[3] "no order for the recovery of possession of any house shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this order and performs the conditions of the tenancy."

[4] The learned Subordinate Judge decided that the objection was not maintainable in the execution department because if there was any illegality in the order for ejectment that was embodied in the decree passed in the original suit the remedy of the applicant was to go in appeal against

the decree for ejectment and get the decree set aside. Accordingly he dismissed the objections. Against this decision there was an appeal to the District Judge who took the same view. Hence the second appeal to this Court.

[5] The learned Government Pleader in support of his contention did not rely on S. 13 of the Control Order, but relied upon S. 14, sub-cl. (3). Now, that sub-clause provides that the decision of the Commissioner and subject only to such decision, an order of the Controller shall be final, and shall not be questioned in any Court. In this case admittedly there is no order of the Controller. I fail to see how the provision of S. 14 (3) can have any application in the present case or can be of any assistance to the judgment-debtor. The learned Government Pleader sought to develop this argument by relying upon S. 14, Defence of India Act, which runs as follows:

[6] "*Jurisdiction of ordinary Courts.* (1) Except as may be provided in this Act or in any rule made thereunder or in any order made under any such rule by the Central Government or the Provincial Government or by an officer not below the rank of Collector empowered under sub-s. (4) or sub-s. (5) of S. 2 to make such order, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.

(2) For the removal of doubts it is hereby declared that any provision in any such rule or order as aforesaid to the effect that the decision of any authority, not being a Court, shall be final or conclusive shall be a sufficient excepting provision within the meaning of sub-s. (1)."

[7] It is, therefore, argued that the effect of the provision of S. 14 is that the exclusive power is now vested with the Controller appointed under the Control Order and that the jurisdiction can no longer be exercised by the civil Court. In my opinion, this argument is not sound. I do not find any provision in any of the sections of the Control Order which takes away the jurisdiction of the civil Courts. The only jurisdiction taken away is that the order of the Controller when made shall be final and shall not be questioned in any Court.

[8] Now, it is well-settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied, and it is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure: per Lord

Thankerton in 67 I. A. 222¹ at p. 236. That was a case under the Sea Customs Act of 1878. The plaintiffs were assessed by the Assistant Collector of Customs, Madras, at 37½ per cent. on tariff valuation as to some of the bags, and as to the remaining bags they were informed that they will be liable to pay duty at 45 per cent. on different tariff valuation. The plaintiffs appealed against that decision and the appeal was dismissed by the Collector of Customs. The Government of India when moved in revision confirmed the Collector's decision. The suit giving rise to the appeal was then instituted to recover the excess amount collected from the plaintiffs by levying duty as already stated. The learned Subordinate Judge came to the conclusion that by reason of the relevant provisions of the Sea Customs Act he had no jurisdiction to entertain the suit. The High Court reversed that decision, but their Lordships of the Judicial Committee came to the conclusion that the levying of the duty was exclusively within the jurisdiction of the Collector of Customs and the jurisdiction of the civil Court was barred. It will be noticed that in that case a duty had been levied and the plaintiffs wanted a refund of the duty.

[9] In the present case I have already stated that there is no order passed by the Controller which stands in the way of the jurisdiction of the civil Court. It is true that their Lordships held in that case that the jurisdiction of the civil Court was excluded by the order of the Collector of Customs on the appeal under S. 188, and it may perhaps be argued that as the order of the Controller in the present case is final it should be held that the jurisdiction of the civil Court is excluded. But it is to be observed, as was pointed out by their Lordships at p. 237 that the main principles to be observed in such cases are to be found in the well known judgment of Willes J. in (1859) 6 C. B. (N.S.) 336² approved by the House of Lords in (1919) A. C. 368,³ and that the question is whether the case falls under the third class stated by Willes J., that is to say, "where a liability not existing at common law is

1. (1940) 27 A. I. R. 1940 P. C. 105 : I.L.R. (1940) Mad. 599 : 67 I. A. 222 : I.L.R. (1940) Kar P. C. 194 : 188 I. C. 231 (P.C.), Secretary of State v. Mask & Co.

2. (1859) 6 C. B. (NS) 336 : 28 L. J. C. P. 242 : 7 W. R. 464 : 120 R. R. 151, Wolverhampton New Water Works Co. v. Hawsford.

3. (1919) 1919 A. C. 368 : 88 L. J. K. B. 282 : 120 L. T. 299 : 35 T. L. R. 167, Neville v. London 'Express' Newspaper, Ltd.

created by a statute which at the same time gives a special and particular remedy for enforcing it"; and it has been always held that with respect to this class the party must adopt the form of remedy given by the statute. It may be observed that no liability which was not existing before is being created by the Control Order so that it can be held that the party must adopt the form of remedy given by the Control Order. It seems to me that in this case merely an alternative remedy is provided which any party can avail himself of, and if the party thus avails himself of that alternative remedy then and then alone the order of the Controller is final subject to investigation by civil Courts as stated above. After examining a number of other cases which were cited on behalf of the plaintiffs and the provisions of S. 32, Government of India Act, 1915, their Lordships observed that

[10] "neither S. 32 nor the principle involved in the decision in 40 I. A. 48⁴ affect the validity of an Act of the Indian Legislature which creates an obligation and provides an exclusive Code for its determination; such an obligation is not covered by sub-s. (2) of S. 32."

[11] As I have just stated the Control Order does not create an independent or a new obligation so that it can be held that it provides an exclusive Code for the determination of that obligation. Reference may also be made to the case in 65 I. A. 301⁵ where Sir George Rankin in delivering the judgment of the Board pointed out the method of determining the exclusion of the jurisdiction of the civil Court in matters which have been expressly provided to be determined by the revenue Courts only, and regarding matters which may incidentally arise in an ordinary suit for a declaration of title to immovable property. His Lordship observed at p. 309 that "on principle it is for the civil Court to determine in the last resort the limits of the powers of a Court of special jurisdiction." It may be observed further that the conditions of S. 13, Control Order, have been complied with in that the decree for ejectment has been passed by the civil Court after it was found that the tenant had not paid the rent due from him. We pointed out a possible remedy to the tenant under S. 4, Control Order. This appears to obviate any conflict between the civil

Court and the Controller. For the reasons I am of opinion that the contention raised by the learned Government Pleader has been rightly negatived by the Courts below.

[12] The matter may be looked at in another way also. No objection as to the jurisdiction of the civil Court was raised by the defendant in the suit. When the jurisdiction of the civil Court has not been questioned by anybody the executing Court is only allowed within narrow limits to declare the decree as being invalid: see 53 Cal. 166.⁶ It is not shown here that the civil Court on the face of it had no jurisdiction whether pecuniary or territorial or in respect of the person of the judgment-debtor to make a decree. There is a well recognised distinction between inherent want of jurisdiction in a Court and want of jurisdiction on grounds which require determination by the Court itself: see 13 P. L. T. 737.⁷

[13] The learned Government Pleader relied upon the case of *Samokanta Mohanta*.⁸ In that case in the course of liquidation of a co-operative society the liquidator directed payment of Rupees 1000 by each of two members of the executive committee of the society, and these two gentlemen sought to recoup themselves by suing the other members of the society for the recovery of these sums. In these circumstances, it was held that the decree passed by the Munsif and the orders made by him in execution of that decree should be set aside as being null and void. Section 42 (6), Co-operative Societies Act of 1912, specifically provides that "save in so far as hereinbefore expressly provided no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act". It was obvious that the jurisdiction of the civil Court was expressly barred by statute and, therefore, the attempt on the part of the two members of the executive committee to pass on their liability to the other members of the society was a matter connected with the dissolution of the society, and it was not a matter in respect of which the civil Court had any jurisdiction. This case does not help the

4. ('13) 40 Cal. 391 : 7 L. B. R. 10 : 40 I. A. 48 : 18 I. C. 22 (P.C.), *Secy. of State v. Moment, J.*
5. ('38) 25 A. I. R. 1938 P. C. 219: I. L. R. (1938) Lah. 514: 65 I. A. 301: 32 S. L. R. 835: 175 I. C. 769 (P.C.), *Mohammad Nawaz Khan v. Bhagatanand*.

6. ('25) 12 A. I. R. 1925 Cal. 907: 53 Cal. 166: 89 I. C. 685 (F.B.), *Gora Chand Haldar v. Prafulla Kumar*.

7. ('33) 20 A. I. R. 1933 Pat. 104: 12 Pat. 117: 142 I. C. 113: 13 P. L. T. 737, *Girwar Narayan v. Kamla Prasad*.

8. ('27) 14 A. I. R. 1927 Cal. 578: 103 I. C. 644, *Samokanta Mohanta v. Sarveswar Das*.

appellant as it is merely an illustration of the principle which I have endeavoured to trace out above that where the jurisdiction of the civil Court is expressly barred in respect of a new obligation, and a new Code is provided for its determination, the matter can only be decided by the newly created tribunal. In the present case before us no new obligation has been created and there has been no decision or order by the Controller, unlike this Calcutta case⁸ where there was an order by the liquidator who was empowered to make that order under the Co-operative Societies Act.

[14] Finally it may be observed that where a right exists, the presumption is that it can be enforced by a civil Court and the onus is on the defendant to show that the jurisdiction of the civil Court is ousted or that some other Court has exclusive jurisdiction to entertain that determination: A. I. R. 1919 P. C. 233.⁹ In the present case, in my opinion, the appellant has not shown that the Controller alone has the exclusive jurisdiction to determine the matter so that the decree passed by the civil Court was without jurisdiction. I would dismiss this appeal with costs.

[15] **Das J.** — I agree, and would like to add a few observations about S. 13, Control Order. It is not very clear from the wording of the section if the "order for the recovery of possession of any house" referred to therein means an order by the Controller under any of the provisions of the Control Order, or means any order for the recovery of possession of any house—passed either by the civil Court or the Controller. If the section is interpreted in the wider sense—and I must say that it is capable of bearing that wider meaning—, even then the bar of S. 13 should have been pleaded in the suit, and not in execution. Section 13 does not oust the jurisdiction of the civil Court: it merely states that unless certain conditions are fulfilled, no order for recovery of possession can be made. Whether those conditions have been fulfilled or not, have to be decided at the trial, and cannot be enquired into in execution; for that would be going behind the decree, which the executing Court cannot do. As to S. 14, Control Order, and S. 14, Defence of India Act, I agree with my learned brother.

D.S./D.H.

Appeal dismissed.

9. (19) 6 A. I. R. 1919 P. C. 233, Mary Board v. William Board.

[Case No. 130.]

A. I. R. (33) 1946 Patna 389

VARMA J.

Leela Singh and others—First Party
v.

B. P. Singh and others—Second Party.

Criminal Ref. No. 58 of 1945, Decided on 3rd January 1946, made by Addl. Dist. Magistrate, Gaya, D/- 18th and 21st July 1943.

(a) Criminal P. C. (1898), S. 145 — 'Parties concerned' means not only persons actually disputing but includes persons concerned in claiming to be in possession—Order in favour of party not mentioned in original notice is valid.

The 'parties concerned' in S. 145 (1) may be persons who are not mentioned in the original notice. The term "parties concerned" in this sub-section should not be so narrowly construed as to mean only the persons actually disputing but should be extended to persons who are concerned in claiming to be in possession. In selecting the persons whom the Magistrate will require to attend his Court for the purpose of laying their claims before him, the Magistrate acts only upon the basis of the information conveyed to him. But so as to attract all persons or parties concerned, he has to affix a copy of the order to some conspicuous place at or near the subject of dispute. The purpose of the enquiry under section 145 is to declare the possession of the party actually in possession; and as soon as a Magistrate decides to investigate under the section, sub-section (3) requires that the order must be duly notified. The reason is obvious, because it is possible that if the order is not notified on the spot and in manner provided by the Code, persons may collude to have an order passed as to possession of a property in favour of one or the other so as to deprive the person actually in possession. [P 391 C 1]

Consequently, persons whose names are not mentioned in the order under S. 145 (1) but who, on the order being notified, appear and file 'written statements as being persons interested in the proceedings before the Magistrate become parties and an order passed in their favour is valid: 30 Cal. 155 (F. B.), *Rel. on.* [P 391 C 1]

Cr. P. C.—

(46) Chitale, S. 145, N. 19 Pts. 4 and 6.

(41) Mitra, S. 145, Page 375 Para. 399.

(b) Criminal P. C. (1898), S. 145—Landlord claiming to be in possession of several plots—Several tenants putting rival claims—One enquiry is not illegal—Failure of Magistrate to consider case of each individual tenant—Order cannot be interfered with in absence of prejudice.

One inquiry under section 145 in a case in which the landlord claims a large number of plots to be in his possession while different sets of tenants claim different plots in their respective possession is not illegal or necessarily irregular; and when there is such a combination of claims of different sets of raiyats against one landlord in one inquiry the question of prejudice will have to be gone into: (38) 25 A. I. R. 1938 Pat. 511, *Rel. on.* [P 392 C 1]

Consequently the failure of the Magistrate to consider the case of each individual tenant in such

a case will not be a ground for interfering with an order under S. 145 when no prejudice is caused thereby. [P 392 C 1, 2]

Cr. P. C.—

('46) Chitaley, S. 145, N. 13 Pts. 5 and 6.

('41) Mitra, S. 145, Page 373 Para. 397 A.

Dr. P. K. Sen with K. K. Sinha, Lal Narain Sinha and K. P. Varma—for the Reference.

Baldeva Sahay, R. K. Sahay, K. N. Lal and Lakshmi Narain Sinha —

Against the Reference.

Order. — This a reference by the Additional District Magistrate of Gaya recommending that the order passed by the inquiring Magistrate in favour of the first-party under S. 145, Criminal P. C., be set aside.

[2] The case of the respective parties has been very well summarised by the learned Additional District Magistrate. The dispute is between Leela Singh and others who happen to be the first party and are raiyats of village Gaffa, on the one hand, and Mr. B. P. Singh and others, the landlords of the village who happen to be the second party, on the other. It relates to eighteen holdings, namely, plots Nos. 54, 55, 44, 45, 183, 184, 27, 129, 216, 193, 194, 66, 67, 134, 136, 137, 264 and 265, covering about 70 acres of *bhaoli* and 25 acres of *naqdi* land. The case of the first party is that these holdings were in possession of tenants originally but were sold by the civil Court at the instance of the Ohunibigha Co-operative Society in execution of money-decrees obtained by the society. The society was put in possession of the holdings by the civil Court in 1936 and 1937 but they sold them to S. Ibrahim who took possession shortly after the delivery of possession to the society. S. Ibrahim is said to have taken possession of the holdings in 1937 although the formal sale deed in favour of S. Ibrahim in respect of the holdings was executed on 3rd April 1940, (the deed is Ex. 15, in these proceedings). S. Ibrahim settled the holdings with the original tenants and allowed them to cultivate the disputed land. Later on, he sold the holdings to Mahanth Shiva Ram Bharathi, by Ex. 15 (a), in August 1940, in the farzi name of Baran Singh. It is said that the Mahanth also allowed the original tenants to cultivate the land. That is to say, the case of the tenants is that the Mahanth settled the land with the original tenants who had continued to cultivate the holdings from 1937 when the society was put in possession, till June 1943, when the Mahanth, partly orally and partly by sale deeds, transferred the holdings to the tenants. Hence the tenants claimed to be in posses-

sion of the disputed land ever since 1937 till the proceedings were started in 1943.

[3] Before setting out the case of the second party I should note here certain relevant dates in connection with the proceedings. A report was made under S. 144, Criminal P. C., on 19th November 1943, and proceedings were drawn up under that section on 22nd November 1943. The proceedings were converted into one under S. 145 of the Code on 13th January 1944; and the notices were actually issued on 26th January 1944.

[4] The case of the second party was that the holdings in question were purchased by the Chunibigha Co-operative Society and the society was put in possession in 1936 and 1937; but that the society abandoned the holdings and made no arrangements for the cultivation of the land, and, therefore, the then maliks, the predecessor in interest of the second party, took possession of the holdings in June 1937, cultivated the land from that time, and that the second party to whom the interest of the then maliks was subsequently transferred, have continued to cultivate the holdings as *bakasht*. That is to say, the case of the second party is that the disputed holdings are their *bakasht* and they have been cultivating these lands.

[5] The inquiring Magistrate has not relied on the evidence, oral and documentary, of the second party, and has accepted the evidence adduced on behalf of the first-party. The learned Additional District Magistrate has recommended on three grounds in his letter of reference for setting aside the order of the inquiring Magistrate. Firstly, he points out that, whereas the notice issued under S. 145 (1) was against Leela Singh, Bhajan Singh, Baran Singh, Rohan Lohar, Gokul Kahar, Mohan Gope, Lekha Gope, Churaman Gope, Chhotan Gope, Basudeo Singh, Brahmadeva Singh and Mahanth Shiva Ram Barathi, the Magistrate has declared possession of Bhajan Singh, Gokul Kahar, Lalji Singh, Sibal Gope, Lekha Gope, Mohan Gope, Firangi Singh, Chhatar Gope, Mohan Lohar and Churaman Gope. The learned Additional District Magistrate points out that four of these persons, namely, Lalji Gope, Sibal Gope, Firangi Singh and Chhatar Singh, were not mentioned in the order under S. 145 (1) and, therefore, no order could be made in their favour. He is of the opinion that although these four persons filed written statements before the inquiring Magistrate, that will not make them parties to the proceedings. I am afraid, this

view of the law cannot be sustained. Sub-section (1) of S. 145 authorises the Magistrate in the given circumstances to record order,

[6] "requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute."

[7] Now, the parties concerned "may be persons who are not mentioned in the original notice." As was pointed out by the Full Bench in 30 Cal. 155,¹ the term "parties concerned" in this section should not be so narrowly construed as to mean only the persons actually disputing but should be extended to persons who are concerned in claiming to be in possession. In selecting the persons whom he will require to attend his Court for the purpose of laying their claims before him, the Magistrate acts only upon the basis of the information conveyed to him. But so as to attract all persons or parties concerned sub-section (3) lays down that a copy of the order made under sub-section (1) shall be served in manner provided by the Code upon the person or persons as the Magistrate may direct, "and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute." The purpose of the inquiry under S. 145 is to declare the possession of the party actually in possession; and as soon as a Magistrate decides to investigate under the section, sub-section (3) requires that the order must be duly notified. The reason is obvious, because it is possible that if the order is not notified on the spot and in manner provided by the Code, persons may collude to have an order passed as to possession of a property in favour of one or the other so as to deprive the person actually in possession. In the present case, it appears that on the order being notified, Sibal Gope, Firangi Singh, Lalji Gope with Bhajan Gope and two other persons appeared and in their written statements described themselves as "persons interested in the proceedings and members of the first party." No objection seems to have been taken with regard to their appearance before the inquiring Magistrate. With regard to Chhatar Singh it seems to be a mistake for Chhotan. In my opinion, therefore, the order of the Magistrate cannot be set aside on this ground.

[8] The next ground recommended is

1. (1933) 30 Cal. 155 (F. B.), *Krishna Kamini v. Abdul Jabbar*.

that Lekha Gope who was a party to the proceeding and in whose favour the Magistrate passed the order of possession on 6th February 1945, had died in November 1944, and, therefore, the order was without jurisdiction. For this piece of information, the learned Additional District Magistrate relies on an affidavit filed before him on behalf of the second party, and he points out that no counter affidavit had been filed on behalf of the first party. I am afraid, the learned Additional District Magistrate had not all the information before him on this point. It appears from the evidence of Tetar (Witness No. 28 of the second party), who was deposing on 13th January 1945, that Lekha Gope was alive. The case continued till 24th January 1945, and the order was made on 6th February 1945. The affidavit relied on by the learned Additional District Magistrate was filed on 3rd April 1945. When there was the positive statement of a witness on behalf of the second party on 13th January 1945, that Lekha Gope was alive, no counter affidavit was called for from the first party. I am afraid, the learned Additional District Magistrate was under a misapprehension in taking notice of the affidavit filed long after the order of the inquiring Magistrate, and the order cannot be interfered with on this ground also.

[9] Lastly, it is pointed out in the letter of reference that the inquiring Magistrate has come to a general finding that the tenants were in possession instead of discussing the case of the individual tenants in the light of the oral and documentary evidence. Dr. P. K. Sen, appearing in support of the reference, has taken me through the evidence on this point. The bulk of the argument is that the inquiring Magistrate has not looked at the documentary evidence in the way in which he should have, or the way in which the second party did look at these documents. The inquiring Magistrate has given his own reasons, which cannot be called unreasonable, for not acting on those documents. Those documents are Exs. F, F (1), H, I, J, K, L and M — village papers, and Exs. G to G (3) petitions filed in Baisakh 1345 by the tenants to be allowed to remain in their homesteads and to work as kamias. I do not say that I would come to different conclusions with regard to the reliability of these documents; but, even if I did so, I would not be justified in interfering with the view taken by the Magistrate, because it was pre-eminently within

his sphere to put his own valuation upon these pieces of documentary evidence adduced in the course of the inquiry. Comment has been made upon the observations of the inquiring Magistrate with regard to Exs. P and P (1) which are judgments of acquittal in two criminal cases. With regard to them, the learned Magistrate said :

[10] "They show that the learned Magistrate who disposed of the cases did not find the cases to be absolutely false. As the complainant could not substantiate the charge the accused persons were acquitted under S. 258, Cr. P. C."

[11] I am afraid, he has worded his observations a little loosely. What he meant to say is to be found towards the end of Ex. P, which runs as follows :

[12] "To sum up judging the evidence as a whole and taking all the circumstances into consideration, my finding is that the prosecution has not substantiated the charge at all by good and reliable evidence which is discrepant and conflicting. The three accused are not found guilty and are accordingly acquitted under S. 258, Cr. P. C."

[13] Similar observations were made in the other judgment Ex. P. (1). In the present case, if the inquiring Magistrate had only quoted these passages no comment could have been made; but I am satisfied that the observations of the Magistrate have not caused any prejudice in the present case. Dr. P. K. Sen urges that the second party have been seriously prejudiced by the inquiring Magistrate considering the case of all the tenants together and not dealing with their cases individually, following the observations made by Noor J. in A. I. R. 1938 Pat. 511.² But there also it was pointed out that one inquiry under S. 145 in a case in which the landlord claims a large number of plots to be in his possession while different sets of tenants claim different plots in their respective possession was not illegal or necessarily irregular; and when there is such a combination of claims of different sets of raiyats against one landlord in one inquiry the question of prejudice will have to be gone into. There the learned Judge wanted to guard against conclusions with regard to specific lands being drawn from general evidence. In the present case, the second party put forward a case of abandonment, and that has been discredited. The oral evidence adduced on behalf of the first party, which is the type of evidence that is really useful in coming to conclusions on the question of possession, has been preferred to that of the second party. In this state of affairs, I do not think any prejudice has

been caused to the second party, and the order of the inquiring Magistrate cannot be interfered with.

[14] On a careful consideration of the grounds recommended in the letter of reference as well as the arguments advanced by learned counsel in support of the reference, I am of opinion that the order of the inquiring Magistrate cannot be interfered with. I would, therefore, discharge the reference.

K.S.

Reference discharged.

[Case No. 131.]

A. I. R. (33) 1946 Patna 392

MEREDITH AND RAY JJ.

Shyam Sunder Prasad

v.

Ramdas Singh.

Second Appeal No. 364 of 1944, Decided on 16th January 1946, from order of 1st Addl. Sub Judge, Chapra, D/- 10th August 1944.

(a) Civil P. C. (1908), S. 48 — Amendment of decree does not extend time.

According to S. 48, the question of amendment of the decree is of no relevance. The section itself is a self-contained one and provides for all such contingencies as may operate to postpone the starting point of the period of 12 years. Amongst the contingencies so enumerated in cl. (b) of sub-s. (1) and cls. (a) and (b) of sub-s. (2) of the section, an amendment subsequent to the date of decree does not find place. Therefore, unless a decree is a decree granting an injunction, the section is a bar to its execution after the period of 12 years irrespective of its having undergone a change by its amendment: ('40) 27 A. I. R. 1940 Mad. 127 (F. B.) and ('32) 19 A. I. R. 1932 All. 351, *Foll.* [P 395 C 2]

C. P. C. —

('44) Chitale, S. 48, N. 10, Pt. 4.

('41) Mulla, P. 205, Pt. (n).

(b) Limitation Act (1908), Arts. 181 and 182 — Decree for permanent injunction not capable of immediate execution — Execution — Limitation — Art. 181 applies — Bar of S. 48, Civil P. C., does not apply.

Where a decree prohibits the defendant from obstructing a village path it is a decree granting permanent injunction and is not capable of execution on the date it is passed or in other words, until an obstruction is caused there is nothing to execute. In such circumstances its execution may not be necessary till after 12 years of the date of its passing. As soon as any obstruction is caused and the Court's order in that behalf is breached a cause of action for enforcement of the decree arises. In such cases Art. 181, Limitation Act, applies and not Art. 182 and the decree-holder's right to apply accrues only when the obstruction is caused. Such a decree is beyond the reach of the bar provided in S. 48, Civil P. C. : ('21) 8 A. I. R. 1921 P. C. 31, *Rel. on.* [P 397 C 1, 2]

Limitation Act —

('42) Chitale, Art. 182, N. 26, Pts. 1 to 3 and N. 29.

('38) Rustomji, P. 1703, Pts. 3 and 4.

2. ('38) 25 A. I. R. 1938 Pat. 511 : 178 I. C. 333, Gulab Kuer v. Ganouri Koeri.

(c) Civil P. C. (1908), S. 11 — Execution proceedings — Principles of rule of *res judicata* apply.

Although S. 11 does not, in terms, extend to execution proceedings and other proceedings of like nature, the general principles of the rule of *res judicata* including the rules of constructive *res judicata* do apply to orders and decisions passed in execution cases. Like the statutory rule of *res judicata* these rules are also subject to certain factors that limit their application. *Case law reviewed.* [P 399 C 1]

C. P. C. —

('44) Chitale, S. 11, N. 23, Pt. 3.

('41) Mulla, P. 89, Pt. (v).

(d) Civil P. C. (1908), S. 11 — Execution proceedings — Decree for injunction — Previous executions praying relief of possession — Relief not granted by decree — Executions held barred by limitation — Subsequent execution for removal of obstruction — Held subsequent execution not barred by principle of *res judicata*.

In a representative suit a decree was passed in 1928 declaring that the plaintiffs had a right of way over a village path and permanently restraining the defendant from obstructing the pathway. In 1930 the decree-holders applied for execution and the relief prayed for was to get the pathway demarcated and possession thereof delivered. This execution was dismissed for default and no further steps were taken till 1940. In 1941, 1942 and 1943 the decree-holders filed executions praying for the same reliefs and these executions were dismissed as barred by limitation. In 1943 the decree-holders filed another execution petition and the relief prayed was to enforce the decree by removing the obstruction caused by the judgment-debtor in 1942. This execution petition was dismissed as barred by *res judicata* on account of the previous execution having been dismissed as barred by limitation :

Held, that a decision in the course of execution proceedings of a question which properly arises for consideration is final and binding between the parties. The reliefs prayed for in previous execution cases which were dismissed as barred by limitation were not the proper reliefs which could be granted by putting the decree into execution. All questions of limitation or any other question that would legitimately arise in such execution cases would refer to that part of the decree which dealt with these reliefs. The point to be considered was whether those execution cases at all related to removal of obstruction caused by the judgment-debtor in 1942 and whether the question of limitation and the question of nature of decree did arise in those proceedings. It was clear that these questions were quite foreign to those execution proceedings. The point which arose for decision in the present execution proceedings was not considered either directly or incidentally in the previous decision which was sought to be put forward as a bar of *res judicata*. Hence the decision in the previous execution proceedings did not operate as *res judicata* : *Case law discussed.* [P 399 C 1, 2; P 400 C1]

C. P. C. —

('44) Chitale, S. 11 N. 23.

('41) Mulla, P. 88 — "Orders in execution proceedings."

D. C. Varma, A. Sashi Sekar Sinha, K. P. Varma, K. N. Lal and G. P. Das

—for Appellant.

S. C. Muzumdar and Bhabanad Mukherji

—for Respondents.

Ray J. — This is a judgment-debtor's second appeal against the order of the 1st Additional Subordinate Judge of Saran, dated 10th August 1944, reversing that of the Munsif and directing that the execution case be restored to file and be disposed of according to law. Put shortly, the facts are that the plaintiff-decree-holder filed a representative suit against the appellant-judgment-debtor, for removal of obstructions, from a village public path, created by erection of a chabutra. The land concerned did belong to the judgment-debtor but it was subject to an encumbrance of right of way enuring to the benefit of the villagers. The plaintiff obtained a decree on 22nd November 1928. The decree of the Court was based upon two awards given by arbitrators, to whom the subject-matter of the suit had been referred, with leave of the Court. The awards were dated 20th August 1928 and 27th September 1928, with which I shall deal in a little more detail presently. The suit as originally framed involved a prayer for issue of a permanent injunction as against the defendants in the following terms:

[2] "That on passing a decree in respect of the above facts, it may be held by the Court that the said pathways which are shown by letters A, B, C and D in the map annexed to the plaint are from time immemorial existing, that the survey entry contrary to this is wrong, that the plaintiff or other persons are not bound thereby, that the conveyance of the plaintiff and others, namely, bullock-carts, elephants and horses have passed along the same and that the plaintiff and others have acquired right of easement also in the said pathways, that on the determination of the above reliefs defendant 1 may be ordered to remove all the obstructions from the said pathways which he has caused thereupon just north and west of the verandah of his old dalan and he may be restrained by means of permanent injunction from making new obstructions on the said pathways so that the grievance of the plaintiff and others may be redressed."

[3] The arbitrators, however, in framing their awards did not conform to the nature of reliefs as cast in the plaint, and accordingly the decree that followed did not in clear and express words purport to grant a permanent injunction restraining the defendant-judgment-debtors from committing nuisance of obstructing the alleged pathways. It is clear, however, that the plaintiff's relief of having the obstruction offered by the defendant's chabutra removed was not granted. The arbitrators, however, expressly declared that the plaintiffs (in other words,

the village public) had a right of way on lands adjoining the chabutra on its three sides and a continuous pathway from east to west to their respective houses on the west. The present execution has been levied by an application dated 14th September 1943, which admittedly is more than 12 years from the decree which, as already stated, was passed on 22nd November 1928. The obvious objection, therefore, is that the decree has lapsed and is incapable of execution being contrary to the provisions of S. 48, Civil P. C. To this objection of the judgment-debtor, the decree-holder's reply is that the decree under execution being one for a permanent injunction, the 12 years' rule of limitation does not apply, and that the decree was finally amended on 1st December 1941, in accordance with the orders of the High Court, and as such, the execution is not time-barred being within three years of the amended decree.

[4] The judgment-debtors, besides the plea of limitation, also advanced further pleas, namely, of *res judicata* or estoppel by judgment. To bring the contentions advanced by the respective parties to relief, a short narration of events that have happened between the date of the decree and the date of this execution has to be set out. The earliest execution that was launched was on 20th September 1929, and the mode in which the Court's assistance was sought for enforcing the decree was to get the pathway demarcated and possession thereof delivered. This execution case was filed in Court of the 3rd Munsif of Chapra. The decree-holder made an application for amendment of the decree in the 1st Munsif's Court, Chapra, which was in the long run disallowed on 10th June 1930. The aforesaid execution case was dismissed for default on 30th January 1930. No further steps were taken for executing the decree till 1940 when Execution Case No. 623 of 1940 was again filed for demarcating the pathway and delivery of its possession. This execution was resisted by the judgment-debtor on the ground that it was barred by limitation. The judgment-debtor's plea found favour with the executing Court who dismissed the same on 2nd July 1940. An appeal was taken to the Court of the District Judge, from this order of the Munsif dismissing the execution case, and the learned District Judge also agreed with the Munsif and dismissed the appeal on 19th February 1940. No appeal was taken to this Court as against the aforesaid appellate order dismissing the execution case as barred by limitation.

[5] During the pendency of this execution case, there was another application for amendment of the decree on 21st March 1940, and the amendment was allowed by the Munsif on 26th February 1941. Against this order of amendment, a petition for revision was filed in this Court and by the Court's order passed by Manohar Lall, J. on 12th September 1941, the order of the Munsif was set aside. His Lordship, however, ordered that such portion of the plaint, as may be thought necessary, may be incorporated in the decree, but in other respects, the decree must stand as it stood on 22nd November 1928. This order was presumably complied with by incorporating a part of the plaint as directed on 1st December 1941. This was followed by another Execution Case No. 526 of 1941, filed in the 1st Munsif's Court, Chapra. In this proceeding too the decree-holder sought the relief of executing the decree by demarcating the path-ways and delivering possession thereof. The learned Munsif dismissed the execution case on 8th April 1942, on the ground that it was barred by limitation. Then followed another execution case by the decree-holder in the 3rd Munsif's Court, Chapra, No. 38 of 1943 instituted on 2nd March 1943. The mode of execution sought was also the same as on previous occasions and this too shares the same fate being dismissed as time barred on 7th September 1943. The decree-holder preferred two appeals against the orders mentioned above, and they were heard analogously by the appellate Court who dismissed both the appeals upholding the orders of both the Munsifs to the effect that the execution cases had been barred by limitation. The date assigned to the appellate Court's order is 26th June 1944. The decree-holder filed an application for review of the appellate Court's order which was also dismissed on 18th November 1944.

[6] During the pendency of the above appeals, another Execution Case No. 1115 of 1943 was filed on 14th September 1943, in the 1st Munsif's Court, Chapra. In this execution petition, the decree-holder sought the aid of the Court to enforce the decree so far as it related to removal of obstruction caused to the path-ways sometime in January 1942. In this respect the execution petition presented a different feature. The learned Munsif dismissed the execution case on grounds that the decree not being one granting an injunction (1) it was barred by the provisions of S. 48, the amendment of 1st December 1941, notwithstanding, (2) and that it was barred by *res judicata* on account of the

previous Execution Case No. 526 of 1941 having been dismissed as barred by limitation. From this order an appeal was preferred and the same was disposed of by the first Additional Subordinate Judge, Saran, who by his order under appeal held in effect that the obstruction caused in January 1942, gave rise to a fresh cause of action, and that it has to be decided on merits whether the alleged cause of action is real, and if so, the execution should proceed as, according to him, it was not barred by three years' rule of limitation, nor by the provisions of S. 48, Civil P. C. He rests his judgment on a reasoning which appears from the passage quoted below :

[7] "Since the matter was referred to arbitration the arbitrators did not in clear and unequivocal language permanently injunct the defendant. Nevertheless there can be little doubt that the purport of the award was an injunction. The award read thus. 'After a due consideration of all the circumstances we are of opinion that the land belongs to the defendant Babu Ram Prasad, but the public and carts used to pass over it from a long time. Hence we allow the existing chabutra already built by Babu Ram Prasad to stand, but just contiguous to chabutra towards north, east and west of it there will be ten feet wide land left for the passage of the public and bullock carts and conveyances without any obstruction by Babu Ram Prasad and to the north of the said ten feet Babu Ram Prasad will have his land up to the verandah of Ram Sarup Lal defendant in the case, and the plaintiff and other members of the public will be entitled to go to their respective houses and to take their conveyances, bullock carts, etc., from east to west passing over this ten feet road running by the east, north and west side of the said chabutra; and the public going to the well on the north of the said chabutra will also have a right of way over the said ten feet land.' Thus it will be seen that there is no clear and unequivocal language of injunction against the defendant in the award. Nevertheless, their injunction is implied in it since the arbitrators held that the land belonged to defendant but gave some of it namely the portion on which the chabutra had already been constructed by defendant to the defendant and gave the plaintiffs and the public the right of use of 10 feet width of land on the contiguous east, north and west of the said chabutra. There was no meaning in making an award of this sort if the said award could be disobeyed safely more than 12 years later because of the barrier of limitation. If that was so, then of what use such an award because once 12 years from the date of the decree had expired the defendant could ignore it as the plaintiff would not be able to put such a decree into execution because of the 12 years period of limitation."

[8] Out of the complex of facts set forth above, the following questions emerge for consideration, viz., (1) what is the effect of the amendment made in the decree on 1st December 1941, on the operation of S. 48, Civil P. C., as a bar to its execution; (2) whether the decree is one to which S. 48,

Civil P. C., is applicable; (3) whether the execution is barred by limitation; and (4) whether the issue of limitation is barred by *res judicata*.

[9] The first question as propounded above admits of a ready answer. According to S. 48, the question of amendment is of no relevance. The section itself is a self-contained one and provides for all such contingencies as may operate to postpone the starting point of the period of 12 years. Amongst the contingencies so enumerated in cl. (b) of sub-s. (1) and cls. (a) and (b) of sub-s. (2) of the section, an amendment subsequent to the date of the decree does not find place. Therefore, unless the decree either in its original form or in its amended is construed to be a decree granting an injunction, S. 48 is certainly a bar to the execution of the decree irrespective of its having undergone a change by its amendment. I am reinforced in the view of mine by the decisions in the case, in I. L. R. 1940 Mad. 349¹ and 54 ALL. 622.²

[10] I shall now proceed to determine the nature of the decree in order to find out if it is one to which S. 48, Civil Procedure Code, is applicable. For this, a close examination of facts relevant to the question is required. To start with, the plaintiff's case as set out in the plaint was that there was a pathway bearing survey No. 343 of the earlier survey which passed from east to west on the north of a verandah attached to defendant 1's old dalan and on its west passed in a southernly direction passing by the western side of the plaintiff's house and joined a road going to the station, and the said pathway was joined at a place just to the north of the aforesaid verandah by another pathway running from north to south on the east of the house of defendant 3. The junction of the two pathways used to serve the purpose of a public open and also a courtyard for the houses of defendants 1 to 3 all of which opened to the said courtyard. According to the plaintiff, defendant 1 got certain fraudulent entries to be made in respect of the junction of the aforesaid pathways as a result of which the pathways, proceeding from the said junction one to the north and the other to the

1. ('40) 27 A. I. R. 1940 Mad. 127 : I. L. R. (1940) Mad. 349 : 187 I. C. 176 (F. B.), Ramchandra Rao v. Parasuramayya.

2. ('32) 19 A. I. R. 1932 All. 351 : 54 All. 622 : 138 I. C. 93, Faquir Chand v. Kundan Singh.

west for some distance and then to the south, closed according to the recent survey map. The obstructions complained of as having been caused to the said pathways by the defendants were (1) construction of a chabutra (platform) together with steps about 9×7 cubits, (2) projection of the thatched frame of the verandah of the old dalan upon the pathway to the extent of 2 cubits, (3) heaping a pile of bricks on the pathway to the west of defendant 1's old dalan leaving only 2 to 3 feet of the pathway and (4) digging of ditches at a place in the junction of the pathways to the east of the house of defendant 3 and south of the verandah of defendant 1 as deep as a man's height. The cause of action, as stated in the plaint, was persistent refusal on the part of the defendants to remove these obstructions which in consequence paralysed transport of men and conveyances of the villagers to their houses. The relief sought was to have a declaration that these pathways existed immemorially, and the village public had a right to pass over them with conveyances, such as bullock-carts, elephants and horses. To this declaratory relief was added two consequential reliefs, namely, (1) removal of the obstructions alleged in the plaint and (2) permanently restraining the defendants from making new obstructions on the pathways. The rest of the reliefs prayed for are not material for the purpose of this case. As already indicated, the subject-matter of the suit was submitted to arbitration by reference from Court and the arbitrators submitted their first award on 20th August 1928. The scope of the reference will appear from the award itself and we have not got either the order of reference or the petition of the parties defining this scope. The award starts with the following words :

[11] "This is a suit for declaration of public right of way over the disputed land. The defendant claims the land in front of his house as part of his homestead land. We held local inspection in presence of the parties and pleaders and read the evidence already recorded in Court and went through documents filed by both sides and heard arguments advanced by both sides."

[12] The decision of the arbitrators in the first award is to the effect: (1) That the land belonged to the defendant Babu Ram Prasad, (2) that the public and their conveyances used to pass over it from a long time, (3) that the existing chabutra already built on the land by Babu Ram Pd. should stand, (4) that there would be left

10 feet wide land just contiguous to the chabutra on its north, east and west for the passage, (5) that the village public, their carts and other conveyances will be allowed to pass and *repass without any obstruction by Babu Ram Prasad*, (6) that the plaintiff and other members of the public would be entitled to go to their respective houses and to take their conveyances, bullock-carts etc., from east to west passing over this 10 feet road running by the east, north and west of the said chabutra, (7) that to the north of the said 10 feet of land for public passage Babu Ram Prasad will have his land up to the verandah of Ram Sarup, defendant 2 (which is to the further north beyond the public road), and (8) that the public going to the well on the north of the said chabutra will also have a right of way over the said 10 feet land. After this award was received in Court, it was remitted to the arbitrators for clarification of certain points which were found to have been left in some ambiguity. The arbitrators thereupon sent a supplementary award on 10th July 1929, and this was confined to defining the road leading to the well on the north. This award on remand was to the effect that a path 3 feet broad along the eastern wall of the house of Mahabal, defendant 2 (more correctly defendant 3) and contiguous to the wall running from south to north up to the southern mouth of the galli leading to the well lying to the north of the galli will be left (free), and that this passage shall not be over and above the cart passage (track) but shall be part and parcel of the same wherever it will run.

[13] The next incident that I wish to notice, for completing the narration relevant to the issue is the amendment of the decree that was allowed by the Munsif but reversed by this Court. The amendment was to the effect (a) that the portion of the cadastral survey No. 343 (which is the survey number as given in the plaint of the village path starting from the east of the chabutra to the houses of the plaintiffs on the southwest) lying west to the chabutra and between the plaintiff's houses and the said chabutra of defendant 1 was also within the scope of the confirmed award so as to make its terms operative; (b) that the revisional survey map showing no way in revisional survey No. 398 and a narrow way between revisional survey Nos. 400 and 401 had been rebutted and made inoperative in face of the confirmed award, and that the cadastral survey map recording the whole pathway

under survey plot No. 343 had been found to be correct and made operative so as to make the terms of the award enforceable; (c) that the decree was for permanent injunction not to obstruct this public way; and (d) that the scope of the award was to give a right of way up to the plaintiff's house on revisional survey plot No. 397 to the public. This amendment was cancelled by this Court and amendment of the decree by incorporating so much of the plaint as is necessary to interpret it was allowed. Keeping all this in view, it is plain to me that the decree prohibits the defendants from putting any obstruction in the village path as claimed in the plaint. In my judgment, therefore, this is not one of the kind of decrees governed by s. 48, Civil P. C. This decree cannot be said to have been spent up after expiry of 12 years from the date it was passed. This is a decree granting permanent injunction.

[14] The next question that I shall proceed to deal with is if execution of the decree, in its true interpretation as stated above, irrespective of its form, is barred by limitation. The decree, so far as it prohibits the defendants from obstructing the village path is not capable of execution on the date it is passed, or, in other words, until an obstruction is caused there is nothing to execute. In such circumstances, its execution may not be necessary till after the 12 years of the date of its passing. As soon as any obstruction is caused and the Court's order in that behalf is breached, a cause of action for enforcement of the decree arises. It is shocking to common sense to hold that by time the cause of action arises for the first time, the decree should have had already become dead. In 40 M. L. J. 1,³ their Lordships of the Judicial Committee held that where the decree is not enforceable as soon as it is passed without something further coming to happen, the Art. 182, Limitation Act, does not apply and in such cases Art. 181 applies. According to Art. 181, limitation of three years begins to run from when the right to apply accrues." In the present case, only when the obstruction is caused the decree-holder's right to apply accrues. From the very nature of the decree that it is one permanently restraining the judgment-debtors from obstructing the village pathway leading from the east down to the west and south till it reaches the houses of the plain-

tiffs and other villagers in whose favour the decree was passed, it is beyond the reach of the bar provided in s. 48, Civil P. C. 23 ALL. 465⁴ and 28 ALL. 300⁵ are also in point. In similar cases of breach of Court's order, Order 21 Rule 32 applies.

[15] The only other matter that remains to be considered is the plea of *res judicata* raised by the judgment-debtor. The contention is that in previous execution cases, it has been held that the decree under execution is not one granting a permanent injunction and is, therefore, incapable of execution in view of the provisions of s. 48, Civil P. C., and that the execution is also barred by limitation in accordance with the provisions of Art. 182 of Sch. 1, Limitation Act. The point raised is not at all free from difficulty. As it is a question of some interest, I propose to deal with it in somewhat detail. The earliest decision dealing with the applicability of the principles of *res judicata* to decisions in execution proceedings was that in 8 Cal. 51.⁶ What happened in that case was that the decree which was barred by limitation was sought to be executed in the year 1874 and the Subordinate Judge upon the petition of 8th October 1874, made an order that the attachment process do issue. This order was passed after notice was served on the judgment-debtor on 23rd September 1874, to show cause why the decree should not be executed against him. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached and remained under attachment until the application for the sale now under consideration was made. The High Court in appeal held: "A decree once dead no proceeding by means of an application out of time could revive it." Their Lordships of the Privy Council in reversing the judgment of the High Court said :

[16] "As already observed, the Subordinate Judge had jurisdiction upon the petition of 8th October 1874 to determine whether the decree was barred on 8th October 1871, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred The present application, having been made within three years after the order of 8th October 1874, is as valid as if it had been made immediately after the expiration of the three months." (The period for which a stay of proceeding was granted to the judgment-debtor.)

3. ('21) 3 A. I. R. 1921 P. C. 31 : 48 I. A. 17 : 59 I. C. 636: 40 M. L. J. 1 (P. C.), Rameshwar Singh v. Homeshwar Singh.

4. ('01) 23 All. 465, Ramsaran v. Chatar Singh.

5. ('06) 28 All 300, Bhagwan Das v. Sukhdei.

6. ('82) 8 Cal. 51 : 8 I. A. 123 : 4 Sar. 248 (P. C.), Mungul Pershad v. Grija Kant Labiri.

[17] In 6 ALL. 269⁷ at p. 275, their Lordships of the Judicial Committee observed :

[18] "Mr. Probyn had jurisdiction to execute that decree, and it was consequently within his jurisdiction and it was his duty to put a construction upon it. He had as much jurisdiction, upon examining the terms of the decree, to decide that it did award mesne profits as he would have had to decide that it did not. The High Court assumed jurisdiction to decide that the decree did not award mesne profits but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did ; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them": (8 I. A. 123=8 Cal. 51.⁶)"

[19] This case has been very strongly relied upon by the learned counsel for the appellant. In 7 ALL. 102⁸ what happened was that in course of a proceeding for execution of a decree the Court construed the decree to award interest at a certain rate till payment and made an order as to its execution. The question of construction of the decree came to arise in a subsequent execution proceeding. Their Lordships in holding that the order passed in the previous execution case relating to the construction of the decree was binding between the parties, observed :

[20] "The High Court took no notice of the ground upon which the Subordinate Judge decided, that the question had been concluded by his order of 25th January 1879, and their Lordships think it should be remarked, in justice to the High Court, that this may be accounted for by the fact that not long before this the Full Bench of that Court had held that the law, which they call the law of *res judicata*, was not applicable to execution proceedings. The question now for their Lordships' decision is, whether the order of 25th January 1879, was not conclusive between these parties? It was an order made in the execution proceedings in this very suit ; and the decision of this Board in 11 I. A. 37⁷ is exactly in point."

[21] In 48 Cal. 499⁹ their Lordships of the Privy Council re-affirmed the principles laid down in 11 I. A. 37.⁷ Lord Buckmaster, who delivered the judgment of the Board, observed at p. 507 :

[22] "The appellate Court, however, took a different view, and regarding the question as still open decided it against the appellant, but the error in their judgment is due to the fact that they regarded the question as completely governed by S. 11, Civil P. C. That section prevents the retrial of issues that have been directly and substantially in issue in a former suit between the same parties,

and this question obviously arises in the same and not in a former suit, but it does not appear that the learned Judge's attention was called to the decision of this Board in 11 I. A. 37,⁷ which clearly shows that the plea of *res judicata* still remains, apart from the limited provisions of the Code, and it is that plea which the respondents have to meet in the present case. In the words of Sir Barnes Peacock (at p. 41) : 'The binding force of such a judgment in such a case as the present depends not upon S. 13 of Act 10 [X] of 1877' (now replaced by S. 11, Civil P. C., 1908) 'but upon general principles of law. If it were not binding, there would be no end to litigation'."

[23] In 48 ALL. 201¹⁰ their Lordships of the Allahabad High Court, relying upon the decisions above referred to and also on the case in 48 I. A. 45,¹¹ held at p. 205 :

[24] "It is true that S. 11, Civil P. C., or any of its explanations, cannot in terms apply to an execution proceeding because the question arises in the same suit and not in a second suit. But, as observed by their Lordships of the Privy Council in 6 All. 269⁷ an order in execution may be as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment does not depend upon S. 13, Act 10 [X] of 1877, but upon general principles of law. If it were not binding there would be no end to litigation : see also the Privy Council case in 8 Cal. 51.⁶"

[25] "Where, therefore, a point has once been expressly decided in the execution department, there can be no doubt whatsoever that that decision binds the parties in all subsequent proceedings. In cases where a point has not been directly decided but is such as must be deemed to have been necessarily decided before an order of execution was passed, the decision has also been held to have a similar binding force. For instance, objections that the application is not in accordance with the law, or that it is barred by time or that the decree is not capable of execution or that the Court has no jurisdiction to entertain the application or that the person applying for execution has not the right to do so, are objections, which if not raised before the execution is ordered, have been decided adversely to the objectors by the execution order."

[25a] Reference may be made to the recent case in 48 I. A. 45¹¹ decided by their Lordships of the Privy Council. At p. 48 Lord Moulton observed :

[26] "It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it' though in that case such a plea was in fact brought forward and decided upon. See also the case in 47 All. 86¹² and the cases cited therein."

7. ('84) 6 All. 269 : 11 I. A. 37 (P.C.), Ram Kirpal v. Rup Kuari.

8. ('85) 7 All. 102 : 11 I. A. 181 (P.C.), Beni Ram v. Nanbu Mal.

9. ('21) 8 A. I. R. 1921 P. C. 11 : 48 Cal. 499 : 48 I. A. 187 : 60 I. C. 631 (P. C.), G. H. Hook v. Administrator-General of Bengal.

10. ('26) 13 A. I. R. 1926 All. 71 : 48 All. 201 : 90 I. C. 83, Dip Prakash v. Dwarka Prasad.

11. ('21) 8 A. I. R. 1921 P. C. 23 : 48 I. A. 45 : 59 I. C. 880 (P. C.), Raja of Ramnad v. Velusami Tevar.

12. ('25) 12 A. I. R. 1925 All. 117 : 47 All. 86 : 80 I. C. 722, Dwarka Das v. Muhammad Ashfaqullah.

[26a] There are various other authorities to the same effect. I do not, however, propose to refer to them. The effect of the authorities above referred to is that although S. 11, Civil P. C., does not, in terms, extend to execution proceedings, and other proceedings of like nature, the general principles of the rule of *res judicata* including the rules of constructive *res judicata*, too, do apply to orders and decisions passed in execution cases. Like the statutory rule of *res judicata* these rules are also subject to certain factors that limit their application, that is to say, the subject-matter of the proceeding in which any particular decision is given must be the same as in a subsequent proceeding in order to make the former decision *res judicata* between the parties. Similarly the issue decided in the previous decision must have directly and substantially arisen for decision. It will not be out of place to refer to certain decisions of this Court in which it has been observed that the special rules laid down in the explanation to S. 11, Civil P. C., which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally in execution cases. In 1 Pat. 593¹³ it was held:

[27] "Although the doctrine laid down in S. 11, Civil P. C., relating to *res judicata* may be applied and rightly applied in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases fought between the same parties, still I do not think that the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases."

[28-29] In this view of the law, it remains to consider whether the point of limitation that arises in the execution proceeding out of which the present appeal arises did in fact arise, and has in fact been decided conclusively as between the parties in previous execution cases. It would be profitable here to refer to the case in 24 C. W. N. 269¹⁴ at p. 272 where it was said:

[30] "It was decided by the Judicial Committee in 11 I. A. 377 and 11 I. A. 181⁸ that a decision, in the course of execution proceedings, of a question which properly arises for consideration is final and binding between the parties."

[31] As I have already shown, in the execution cases which were dismissed as

barred by limitation the reliefs sought were to demarcate the suit path-way and to deliver possession thereof to the decree-holder. On examination of the reliefs sought in the plaint and those granted by the arbitrators in their award both of which were incorporated in the decree, the decree-holders were not entitled to get possession of the lands on which the path-way existed. The reliefs prayed in the execution cases, therefore, were not the proper reliefs which could be granted by putting the decree into execution. All questions of limitation or any other question that would legitimately arise in such execution cases would refer to that part of the decree which dealt with those reliefs. The executing Court and the appellate Court were perfectly right in deciding that the decree relating to the path-ways to which the relief in those execution cases was considered from the decree, it only gave a declaration that the villagers were entitled to have the path-ways from the east of the chabutra to the west and then to the south down to the houses of the plaintiffs and other villagers. The decree, so far as it related to this part of the relief, cannot be said to be a decree granting a permanent injunction, and as such exempt from the operation of S. 48. Even if the decree granted the relief claimed, namely, the relief of having the pathway demarcated and getting delivery of possession thereof, yet it should be clearly barred by limitation both on account of the three years' rule under Art. 182 of Sch. 1, Limitation Act, and of the 12 years' rule of S. 48, Civil P. C. The point to be considered is whether those execution cases at all related to removal of an obstruction that had been caused by the judgment-debtor in the path-way concerned in January 1942 and whether the question of limitation, and for that purpose, determination of the nature of the decree, which no doubt had given the villagers the right to free passage and had imposed an obligation upon the judgment-debtor not to obstruct the same, did arise. It is clear on the very face of it that these questions were quite foreign to those execution proceedings. The decree in effect amounts to an order of the Court prohibiting the defendant judgment-debtor from obstructing the pathway. If and when the judgment-debtor does obstruct it in defiance of the Court's order, he is guilty of disobedience of the Court's order which amounts to contempt. The question arises, has it at all been considered in the decisions which are sought to operate as a

13. ('22) 9 A. I. R. 1922 Pat. 289; 1 Pat. 593; 67 I. C. 656, Prithi Mahton v. Jamsbad Khan.

14. ('20) 7 A. I. R. 1920 Cal. 354; 47 Cal. 446; 55 I. C. 189; 24 C. W. N. 269, Kali Das v. Prosunno Kumar.

bar of *res judicata* or did the Court consider either directly or incidentally the identical point which has arisen for our decision in the present execution case. The answer obviously is in the negative. Therefore, it is difficult to hold that those decisions will operate as *res judicata*.

[32] Their Lordships of the Privy Council have also taken a similar view with regard to the application of the rule of *res judicata* to execution cases in 33 ALL. 264.¹⁵ In that case, a mortgage decree was passed on 25th August 1900, against A and B. This decree was made absolute on 21st December 1901. B got the decree, against her, set aside on the ground of non-service of summons, and the suit was retried as against her. In the retrial, a preliminary decree against B was passed on 15th August 1902. B's appeal against this decree was dismissed by the High Court on 16th November 1904. The plaintiff applied to make the decree of 15th August 1902, absolute against both A and B. The Court made it absolute against B only and said that the decree against A dated 15th August 1900 and 21st December 1901 *had become extinct being barred by limitation*. This order was passed on 27th November 1905. On 21st December 1905, the plaintiff filed an application for execution basing the same on decrees of 25th August 1900, 15th August 1902, 16th November 1904, 21st December 1901 and 27th November 1905. The judgment-debtor raised a point of limitation and pleaded that the point was concluded by the order of 27th November 1905 which order was *res judicata*. Their Lordships of the Privy Council held that the execution case was not barred by limitation. With regard to the point of *res judicata* their Lordships said:

[33] "With regard to the second point that the plaintiff was estopped in the present proceedings by the judgment given against him on 27th November 1905, upon his application of 15th February 1905, it is sufficient to say that the present application is different from the application then before the Court."

[34] Their Lordships pointed out that the present application was based on all the different decrees above referred to, while the application of 15th February 1905, was based only upon the decree of 15th August 1902. In 30 Mad. 504¹⁶ the plaintiff obtained a decree in 1876 directing the defendant to

pay Rs. 110 per month as maintenance from the date of the plaint until her death. The application for recovery of maintenance was held to be barred by limitation by an order No. 134 of 1884 and this order was upheld in appeal. Then subsequently, there was another application for recovery of arrears of maintenance and the previous decision on the point of limitation was pleaded, as *res judicata*. It was held by their Lordships of the Madras High Court:

[35] "As an erroneous decision on a point of law, it does not in our opinion operate as *res judicata*, so as to bar applications to recover arrears of maintenance which have since accrued."

[36] To the same effect is the decision in 18 Mad. 482.¹⁷ The decree prohibiting the judgment-debtor from obstructing the pathway (the prohibition being conveyed by the words "the passage will be left for the passage of the public, etc., without any obstruction by Babu Ram Prasad and the public will be entitled to go to their houses and take their conveyances") is not capable of execution until the Court's order is breached. In such a case neither the period of limitation under Art. 182 nor the period of limitation provided by S. 48, Civil P. C., would, if free of authority I would venture to suggest, commence to run until the decree-holder's right to apply arises. I may cite an illustration; suppose a decree is passed for recovery of possession of a certain property from the judgment-debtor after happening of certain incident and the said incident happens more than 12 years after the passing of the decree. Can it be urged with any amount of reasonableness that by the time the right to execute the decree accrues to the judgment-debtor the decree stands dead and extinct. In my view, therefore, the plea of *res judicata* fails. It may be noted that the present execution case is based not on the decree as it stood but the decree in its amended form. This makes the case parallel to the case in 33 ALL. 264.¹⁵ The cause of action and the nature of the relief arising therefrom are different. If the Courts in the previous execution cases expressed any view on the nature of this part of the decree, we are concerned with, such expressions are merely expressions of opinion or *obiter* and hence not operative as *res judicata*. In the result I would uphold the order of the learned Subordinate Judge and dismiss this appeal with costs.

15. ('11) 33 All. 264 : 38 I. A. 37 : 9 I. C. 975 (P. C.), Ashfaq Husain v. Gauri Sahai.

16. ('07) 30 Mad. 504, Aitamma v. Narayana Bhatta.

17. ('95) 18 Mad. 482, Kuppu Ammal v. Saminatha Ayyar.

[37] **Meredith J.**—I entirely agree. In my opinion the extraordinary persistence of the decree-holder in this case is due to the fact that he has a real grievance with regard to the interpretation by the Courts of his decree, a grievance which Court after Court has failed to redress.

G.B./D.H.

Appeal dismissed.

[Case No. 132.]

* **A. I. R. (33) 1946 Patna 401**

MEREDITH J.

Ethel Ada Brown — Petitioner

v.

Charles Earnest Brown — Respondent.

Matrimonial Case No. 4 of 1945, Decided on 9th January 1946.

(a) Interpretation of Statutes — Fiscal Statutes — Construction.

Fiscal Statutes, for example, the Court-fees Act, must be construed strictly and in favour of the subject. [P 402 C 1]

Court-fees Act—

('44) Chitaley, S. 1, N. 13.

('36) Aiyer, Page 4, Pt. 14.

*(b) Court-fees Act (1870), Sch. II, Arts. 20 and 17 (vi) — Petition under Indian and Colonial Divorce Jurisdiction Act, 1926 and 1940 — Court-fee on, is payable under Art. 17 (vi) and not Art. 20 nor Art. 1 (d) of Sch. II.

Articles in the Court-fees Act cannot be applied by analogy. Article 20 relates only to petitions under the Indian Divorce Act and can have no application except to petitions under that Act. Though certain provisions of that Act may have been made applicable to proceedings under the Indian and Colonial Divorce Jurisdiction Act, that itself cannot convert a petition under the latter Act into a petition under the Indian Divorce Act. Though the proceedings under the Indian and Colonial Divorce Jurisdiction Act are to be regulated by the Indian Divorce Act and the rules made thereunder, Art. 20 of Sch. II, Court-fees Act, is not a rule under the Indian Divorce Act. Relief under the Indian Colonial Divorce Jurisdiction Act is granted only upon grounds which would be applicable in England. Hence Art. 20 is not applicable to a petition under that Act : ('35) 22 A. I. R. 1935 All. 791, *Ref.* [P 402 C 1]

But the proceeding under that Act though initiated by a petition, is in the nature of a suit and not merely an application. Therefore the proper Article applicable to a petition for dissolution of marriage under the Act is the residuary Art. 17 (vi) of Sch. II, Court-fees Act and not Art. 1 (d) of Sch. II. [P 402 C 2]

Court-fees Act—

('44) Chitaley, Sch. II, Art. 17 (vi), Note 1.

P. K. Bose — for Petitioner.

Yasin Yunus for Government Advocate—
for the Crown.

Judgment. — This is a court-fee matter which has been referred to me as Taxing Judge. The question is, what is the court-

fee payable upon a petition for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act, 1926, and 1940? In the present case a court-fee of Rs. 3-12-0 only has been paid under Sch. II, Art. 1 (d), Court-fees Act as on an application or petition presented to a High Court. The Stamp Reporter, however, took the view that court-fees should be paid under Sch. II, Art. 20 which provides a court-fee of Rs. 30 in every petition under the Indian Divorce Act, except petitions under S. 44 of the same Act and every memorandum of appeal or cross-objection under S. 55 of the same Act. He concedes that that Article can only be applied by analogy, as no direct provision has been made in the Court-fees Act with regard to petitions under the Indian and Colonial Divorce Jurisdiction Act but he relies upon the fact that S. 1 (4), Indian and Colonial Divorce Jurisdiction Act, 1926, provides that :

[2] "Proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State in Council of India with the concurrence of the Lord Chancellor."

[3] The rules made under this provision, published in the Gazette of India, dated 26th August 1927, provide in R. 24 that subject to the provisions of these rules all proceedings under the Act between party and party shall be regulated by the Indian Divorce Act and the rules made thereunder and provide in R. 22 that proceedings relating to alimony, maintenance, custody of children and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Indian Divorce Act, 1869, and of the rules made thereunder.

[4] In the alternative, the Stamp Reporter suggested that the court-fee should be charged under the residuary article, Art. 17 (vi), Sch. II, Court-fees Act, which provides for "every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided by this Act."

[5] The learned Taxing Officer, as there have been no decisions of this or any other High Court, save one to which I shall refer, and as the matter is of general importance, has made this reference to me under S. 5, Court-fees Act. He mentions that it has heretofore been the practice in this Court to require a court-fee under Sch. II, Art. 20, Court-fees Act.

[6] The petitioner, for the contention that only Rs. 3-12-0 is payable, relies upon

the use of the word "petition" in the Act, and points out that under R. 5 of the rules all proceedings under the Act shall be commenced by filing a petition to which shall be attached a certificate of the marriage. He relies further upon the single decision to which I have referred, which is that of Bennett J. of the Allahabad High Court in *Smurthwaite v. Smurthwaite*, 58 ALL. 259.¹ The learned Judge held that court-fee should be paid as upon an application to the High Court. He did not, however, issue notice to the Government Advocate, and the matter was heard *ex parte*.

[7] Fiscal Acts must be construed strictly and in favour of the subject. It is, in my judgment, not possible to apply Art. 20 of Sch. II. Articles in the Court-fees Act cannot be applied by analogy. The article in question in terms relates only to petitions under the Indian Divorce Act, and can have no application except to petitions under that Act. Though certain provisions of the Indian Divorce Act may have been made applicable to proceedings under the Indian and Colonial Divorce Jurisdiction Act, that in itself cannot convert the petition into a petition under the Indian Divorce Act. True, the proceedings shall be regulated by the Indian Divorce Act and the rules made thereunder, but Art. 20 of Sch. II, Court-fees Act, is surely not a rule under the Indian Divorce Act. As Bennett J. has rightly pointed out, relief under the Indian and Colonial Divorce Jurisdiction Act is granted only upon grounds which would be applicable in England. I am quite clear that Sch. II, Art. 20 cannot be applied, and the previous procedure in this Court has been wrong.

[8] Coming now to Art. 17 (vi) of Sch. II, that applies only to suits. The question, therefore, is whether the proceeding in question is a suit, or is merely an application. I have no hesitation in holding that it is a suit. It is true that the proceedings are initiated by petition. That, however, means nothing. Under the Indian Divorce Act, the proceedings are also initiated by petition, see S. 10. "Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved, etc., etc.," yet the Act right through makes it clear that the proceedings are by suit. For example, S. 6 refers to "all suits and proceedings in causes and matters matrimonial." Section 15 refers to "any

1. (35) 22 A. I. R. 1935 All. 791 : 58 All. 259 : 158 I. C. 621.

suit instituted for dissolution of marriage." Section 36 speaks of "any suit under this Act whether it be instituted by a husband or by a wife, etc., etc."

[9] It is quite true that the word "suit" is not to be found in the Indian and Colonial Divorce Jurisdiction Acts, but S. 1 (1) of the Act of 1926 in express terms confers jurisdiction on the High Court to make a decree for dissolution of a marriage and as incidental thereto to make certain orders. The use of the word "decree" clearly implies that the proceedings are really by way of suit, though initiated by petition. We get a definition of "decree" in S. 2 (2), Civil P. C., as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit etc."

[10] The learned Taxing Officer has referred to a decision of a previous Taxing Judge of this Court in Second Appeal No. 569 of 1919 on 20th June 1919, wherein the learned Judge held that in a suit for restitution of conjugal rights Art. 17, cl. (vi) of Sch. 2 is the article applicable. As the stamp reporter has pointed out, such a suit is in a way the inverse of a suit for dissolution of marriage. The practice has always been to treat these proceedings for dissolution of marriage as suits. The present proceeding has been numbered as "Matrimonial Suit No. 4 of 1945," and the learned Taxing Officer starts by saying that "a suit has been brought by a wife for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act." It may be noticed also that though proceedings under the Indian Divorce Act are by the provisions of the Act itself, suits, yet in framing Art. 20 of Sch. II the word "petition" was used. There is, therefore, as I have said, nothing in the use of the word "petition."

[11] Having regard to all the circumstances I have no hesitation in holding that we are dealing with what is in substance a suit, and not a mere application. It follows, therefore, that the petitioner is wrong in affixing court-fee of Rs. 3-12-0 only. The proper article is Art. 17 (vi) of Sch. II, for it is a suit for which no provision has been made elsewhere in the Court-fees Act and in which it is not possible to estimate the subject-matter in dispute at a money value. I answer the reference accordingly. The petitioner is allowed two weeks to pay the deficit court-fee.

N.S./D.H.

Answer accordingly.

[Case No. 133.]

A. I. R. (33) 1946 Patna 403

FAZL ALI C. J. AND PANDE J.

Sir Kameshwar Singh — Appellant

v.

*Jaiparkash Narain Singh and others
— Respondents.*

Appeal No. 223 of 1944, Decided on 11th December 1945, from original order of Sub-Judge, Gaya, D/-28th March 1944.

Bihar Tenancy Act (8 [VIII] of 1885), Ss. 158 AA and 148 (g)—Service of notice under S. 148 (g) is not a condition precedent to filing of execution—S. 158AA does not prohibit filing of execution within 45 days of service of notice but merely prohibits attachment and sale within such period.

The service of notice under S. 148 (g) is not a condition precedent to the filing of application for execution of a decree. Section 158AA does not prohibit the decree-holder from putting in an application for execution of his decree within 45 days of the service of notice under S. 148 (g) and there is nothing in that section which prevents the Court from entertaining an application within the said period of 45 days. The section merely prohibits the realisation of the decree by attachment and sale of the judgment-debtor's property within a period of 45 days from the date of service of notice. Where an application for execution is filed without the service of notice under S. 148 (g) the Court has to insist upon the decree-holder taking out such notice with a view to giving the judgment-debtor an opportunity of paying the decretal sum : ('45) 32 A. I. R. 1945 Pat. 268 and M. A. No. 152 of 1943, *Rel. on.* [P 403 C 2]

S. P. Srivastava—for Appellant.

Sarjoo Prasad, Murtaza Fazl Ali and Anisur Rahman—for Respondents.

Pande J. — This appeal is directed against the order of the Subordinate Judge, Third Court, Gaya, under S. 47, Civil P. C., in an execution proceeding for the realisation of decretal dues under a rent decree which was passed on 7th May 1940. It appears that the decree-holder had made a previous application for execution which was registered as Execution Case No. 128 of 1941. During the pendency of that execution case notice under S. 148(g), Bihar Tenancy Act, was served on 18th April 1943. That case was however, dismissed by the Court on 21st April 1943, on the ground of non-service of the notice. The decree-holder presented a second application for execution on 4th May 1943. The judgment-debtor objected to the entertainment of the second petition on the ground that no application for execution could be entertained within 45 days from the date of service of notice which is the period prescribed for payment of the decretal dues. This objection prevailed with

the lower Court and the Court by its order dated 28th March 1944, directed the execution case to be struck off.

[2] It is contended for the appellant that there is nothing in S. 158AA, Bihar Tenancy Act, which bars the decree-holder from putting in an application for execution of his decree within 45 days from the date of service of the notice, nor there is anything in that section which prevents the Court from entertaining an application within the said period of 45 days. It is stated that the section merely provides that if the judgment-debtor fails to pay to the decree-holder or deposit into Court the decretal amount, such amount may, upon an application made in this behalf, by the decree-holder be realised by the attachment and sale of the property of the judgment-debtor, both movable and immovable. It is argued that the service of notice under S. 148 (g), Bihar Tenancy Act, is not a condition precedent to the entertainment of an application for execution and it merely bars the realisation of the decree by attachment and sale of the judgment-debtor's property within the said period of 45 days from the date of service of notice. In support of the contention, reference is made to the decision of a Division Bench of this Court in 24 Pat. 153.¹ This case is a clear authority in support of the contention of the learned advocate. In that case reference is made with approval to a previous decision of Reuben J. in M. A. No. 152 of 1943,² unreported. In that case, his Lordship pointed out that S. 158AA, lays stress on the realisation of the decree by attachment and sale of the judgment-debtor's property and not on the filing of an execution petition, that is to say, S. 158AA does not prohibit the filing of an execution petition, but only provides that the judgment-debtor should be given a further chance of complying with the terms of the decree against him before his property, movable or immovable could be put up for sale in realisation of the decree against him. In 24 Pat. 153¹ their Lordships laid down that non-issue and non-service of the notice under S. 148 (g), Bihar Tenancy Act is not a bar to the decree-holder putting an application for execution of his decree. It is not a condition precedent to the executing Court obtaining jurisdiction to proceed with the execution itself. His Lordship Sinha J. observed :

1. ('45) 32 A. I. R. 1945 Pat. 268 : 24 Pat. 153, *Sayeeda Khatoon v. Bisundeo Singh*.

2. M. A. No. 152 of 1943, *Ramcaran Singh v. Srimati Janki Devi*.

[3] "Where the decree-holder comes on the very last day of limitation with a prayer to execute his decree, the Court can not throw out his application for execution on the ground of non-service of notice under S. 148 (g), Bihar Tenancy Act. In such circumstances the only power given to the Court is to insist upon the decree-holder taking out notice under S. 148 (g). Such a notice has to be taken and has to be served with a view to giving the judgment-debtor the opportunity of paying the decretal sum and if he does not avail himself of the opportunity, the law must take its course and the property must be sold in satisfaction of the decree."

[4] With this observation I respectfully agree. That decision clearly concludes this appeal. I would, therefore, set aside the order of the Court below and allow the appeal with costs. Hearing fee assessed at two gold mohurs.

Fazl Ali C. J.—I agree.

K.S.

Appeal allowed.

[Case No. 134.]

A. I. R. (33) 1946 Patna 404

MANOHAR LALL AND REUBEN JJ.

Ajodhya Prasad Bhagat—Appellant

v.

Gobind Missir and another —

Respondents.

Appeal No. 1057 of 1943, Decided on 12th February 1946, from appellate decree of Sub-Judge, Bhagalpur, D/- 28th June 1943.

(a) Contract Act (1872), S. 74 — Instalment mortgage bond—Interest payable only if instalments are in arrears—Bond is interest bearing bond though stipulation to pay interest may amount to penalty — Stipulation to pay interest not found to be by way of penalty — Bond is interest bearing bond.

Where an instalment mortgage bond provides that no interest is payable if all the instalments are paid within time, but the parties contract that if the instalments are in arrears, the creditor would have the right to realise interest at a stipulated rate, it may be that in a proper case the Court may come to the conclusion that the stipulation to pay this rate of interest was by way of penalty, but that would only affect the question as to the rate upon which interest would be payable by the debtor. It would not mean that the debt was not an interest bearing debt. Moreover, where it has not been found that this stipulation to pay interest was by way of any penalty or that the interest can only be decreed at a reduced rate, the bond or debt must be held to be an interest bearing bond or debt. [P 405 C 2]

(b) Limitation Act (1908), S. 20—Open payment to be treated as paid towards interest must be paid towards interest as such but no indication in writing is necessary — Plaintiff not appropriating portion of amount paid towards principal nor towards interest — Amount paid exceeding interest due on date of payment—Part of amount cannot be held to have been paid towards principal and part towards interest.

In the case of an open payment, it can only be treated to have been paid towards interest if from the circumstances it can be found as a fact that it has been paid towards interest "as such". It is not necessary that the writing itself should contain the indication that it is being paid towards interest "as such"; the plaintiff is entitled to show from the evidence and the circumstances in the case that the payment was made towards interest "as such". Where the plaintiff does not say that he appropriated a portion of the amount paid by the defendant, which exceeds the interest due on the date of payment, towards the principal within the period of limitation, but on the other hand says that he received the amount towards interest but there is a clear finding of fact that the amount was not paid towards interest 'as such' it cannot be held that a part of the amount went to pay off the principal, and that a part was necessarily paid as interest and the plaintiff cannot take advantage of any part of the provisions of S. 20: ('40) 27 A. I. R. 1940 P. C. 63, *Applied*; ('46) 33 A. I. R. 1946 Pat. 59 and ('45) 32 A. I. R. 1945 Pat. 271, *Rel. on.* [P 405 C 2; P 406 C 1]

Limitation Act—

('42) Chitaley, S. 20, N. 5, Pts. 11 and 22; N. 6, Pt. 2, N. 24 Pt. 14.

('38) Rustomji, Page 369, Pt. 4.

(c) Limitation Act (1908), S. 19 — Acknowledgment—Endorsement on back of mortgage bond "Rs. 11 has been paid"—Endorsement is not acknowledgment.

An endorsement on the back of a mortgage bond "Rs. 11 has been paid" cannot be construed as being anything more than a statement of the payment and it cannot save limitation as an acknowledgment: ('42) 29 A. I. R. 1942 Mad. 353 (F.B.), *Applied*; ('42) 29 A. I. R. 1942 Mad. 146, *Disting.* [P 406 C 2; P 407 C 1]

Limitation Act—

('42) Chitaley, S. 19, N. 5, Pt. 3.

('38) Rustomji, Page 317, Pt. 4.

S. C. Misra — for Appellant.

G. P. Das — for Respondents.

Manohar Lall J.—This is an appeal by the plaintiff whose suit for recovery of a sum due on the basis of an instalment mortgage bond has been dismissed by the appellate Court on the ground of limitation. The facts are no longer in controversy and must be stated in order to appreciate the strenuous contention raised by Mr. Misra on behalf of the appellant. On 4th June 1924, the defendant executed a *kistbandi* mortgage bond for Rs. 408-4-0 in lieu of a previous debt in plaintiff's favour. The bond provided that

[2] "Should there be default in payment of any instalment, the said creditors shall have the right to realise the expired and unexpired instalment at a time by instituting suit in Court. . . . In case of default of interest the said creditors shall have the right to realise the money of all the instalments with interest from the date of this bond till realisation at the rate of one per cent. per mensem."

[3] The defendants paid Rs. 286-8-0 towards principal and interest in four instalments during 1925 to 1927. On 23rd June 1930 a sum of Rs. 11 was paid. The endorsement on

the back of the bond regarding this item is "*egareh rupeya adai kia*," that is to say, Rs. 11 has been paid. The plaintiff's case was that this amount of Rs. 11 was paid towards interest, but the defendants' case was that they never made any payment of Rs. 11 as alleged by the plaintiff but that they made a payment of Rs. 125, and that the writing of that payment has been removed by the plaintiff and in lieu thereof he has forged the entry of payment of Rs. 11. The Courts below have concurrently found that the defendant's case is false, and that on the evidence it must be held that the sum of Rs. 11 was paid in the nature of a general payment by the defendants and that the factum of that payment appears in the handwriting of the defendant. The trial Court erroneously thought that the plaintiff had stated in the plaint that the payment of Rs. 11 had been made towards principal and interest. The plaint has been read out to us, and we are satisfied that the learned Subordinate Judge is right when he stated in appeal that the plaintiff's case was that Rs. 11 has been paid towards interest. It may be that the learned Munsif fell into the error because he was thinking of the other payments which were made towards interest and principal. It is true that the plaintiff did not state in his evidence that Rs. 11 was paid towards interest, but after the close of the evidence of P. W. 2 he was recalled and made to say that the payment of Rs. 11 was made towards interest. But the learned Subordinate Judge has disbelieved this evidence of the witness and having disbelieved him he comes to the conclusion that there was nothing in the record to show that the intention of defendant 1 was that the payment of Rs. 11 should go towards interest. It must, therefore, be held that the payment of Rs. 11 was not made towards interest 'as such'. The situation is thus covered by the Full Bench decision of the Allahabad High Court in 58 ALL. 261¹ and the majority view was accepted as correct by their Lordships of the Judicial Committee in 67 I. A. 160.² The suit of the plaintiff, therefore, which was instituted on 10th June 1942, was barred by limitation.

[4] The learned advocate for the appellant, however, seeks to escape from the

1. (35) 22 A. I. R. 1935 All. 946: 58 All 261: 159 I. C. 387 (F.B.), Udeypal Singh v. Lakshmi Chand.

2. (40) 27 A. I. R. 1940 P. C. 63 : I. L. R. (1940) Lah. 470: I. L. R. (1940) Kar. P. C. 134: 67 I. A. 160: 187 I. C. 233 (P. C.), Ram Shah v. Lalchand.

difficulty by arguing in the first place that the debt in the present case was not an interest bearing debt. He has referred elaborately to the commentary by Pollock and Mulla under S. 74, Contract Act, where it is stated that where interest is payable as default it is really damages by way of interest. Having perused the *Kistbandi* bond, which we got translated by the office, I am satisfied that in the present case the debt is an interest bearing debt. It is true that no interest was payable if all the instalments were paid within time, but the parties contracted that if the instalments were in arrears, the creditor would have the right to realise interest at a stipulated rate. It may be that in a proper case, the Court may come to the conclusion that the stipulation to pay this rate of interest was by way of penalty, but that would only affect the question as to the rate upon which interest would be payable by the debtors. It would not mean that the debt was not an interest bearing debt. In the present case, moreover, it has not been found that this stipulation to pay interest was by way of any penalty or that the interest can only be decreed at a reduced rate. I would, therefore, hold, overruling the first contention, that this is an interest bearing bond or debt. It was then argued that as the amount of Rs. 11 which has been found to have been paid on 23rd June 1930, exceeded the interest due on that date, it must necessarily be held that a part of the amount went to pay off the principal, and that a part was necessarily paid as interest. This argument is equally untenable. It has now been authoritatively determined by their Lordships of the Judicial Committee that in the case of an open payment, it can only be treated to have been paid towards interest if from the circumstances it can be found as a fact that it has been paid towards interest "as such". It is not necessary that the writing itself should contain the indication that it is being paid towards interest "as such"; the plaintiff is entitled to show from the evidence and the circumstances in the case that the payment was made towards interest "as such". In the present case, however, there is a clear finding of fact that the amount was not paid towards interest "as such". How then can it be held that a portion of the amount was paid towards the principal? The plaintiff does not say that he appropriated a portion of this amount towards the principal within the period of limitation, but on the other hand he says in the plaint

that he received the amount towards interest. For this reason, it must be held that the plaintiff cannot take advantage of any part of the provisions of S. 20, Limitation Act. This view is supported by two recent decisions of this Court—1945 P. W. N. 178³ and 1945 P. W. N. 264.⁴

[5] It is interesting to observe that the Privy Council case in 67 I. A. 160² which has been relied upon by both the parties before us itself contains a consideration as an illustration of the very situation which has arisen in this case. At page 169 their Lordships referred to the case in 42 C. W. N. 509⁵ in which the judgment of the Board was delivered by Lord Russel of Killowen. In that case the judgment-debt was payable by instalment as a result of a compromise. The first instalment was Rs. 13,000 together with a year's interest from 27th January 1928 to 26th January 1929 and was payable on the last-mentioned date. The payment of Rs. 825 was made on 15th February 1929. Lord Russel observed :

[6] "The last payment made in respect of the first instalment and interest was a sum of Rs. 825 paid, as admitted by the parties on 15th February 1929. The payment was made, and necessarily made, in respect of principal and interest; it was therefore a payment of interest on a debt as such by the person liable to pay the debt. Further in a letter addressed to the decree-holders, and signed by Bodh Raj, he says, referring to the Rs. 825, 'Deduct from this the amount that is due to you for my first instalment according to accounts and keep the rest in my name Send me a formal receipt of the amount of the first instalment together with interest by registered post'. These facts are sufficient to show that S. 20 has come into play, and that accordingly the period of limitation must be computed from 15th February 1929."

[7] The situation in the present case is different as there are no circumstances from which it can be held that a part of Rs. 11 was paid towards interest 'as such'; nor can it be held that the whole or a part of it has been paid towards principal because in the first place the debtor does not say so; indeed he says he never made this payment but paid another sum of Rs. 125 and in the second place the plaintiff does not say so as in his plaint he says he received the money towards interest, and in the third place no appropriation towards principal has ever been made by the present plaintiff.

3. ('46) 33 A. I. R. 1946 Pat. 59 : 219 I. C. 159 : 1945 P. W. N. 178, Sarabdeva Prasad Missir v. Dwarka Prasad.

4. ('45) 32 A.I.R. 1945 Pat. 271 : 24 Pat. 96 : 220 I. C. 255 : 1945 P. W. N. 264, Ramchand Kesardeo v. Shaikh Shitu Shaikh Rahmat.

5. ('38) 42 C.W.N. 509 (P. C.), Firm Rai Bahadur Het Ram Bodh Raj v. Aya Ram-Tola Ram.

Reference may be made here to the observations of Sir George Rankin at page 174 :

[8] "What, then, in the case of an 'open' payment, is required in order that it may be said in the words of S. 20 that before the expiration of the prescribed period part of the principal of the debt has been paid by the debtor? While not of opinion that it need be shown that the creditor's appropriation has within the time limited been communicated to the debtor, they are unable to regard the language of the section as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient."

[9] When I apply this principle to the facts of the present case, I find that it has not been established that the plaintiff has shown that he appropriated the whole or any part of this sum of Rs. 11 towards the principal with the result that this contention of the appellant must also be overruled. The learned advocate then argued that the endorsement of the payment of Rs. 11 should be held to constitute acknowledgment of the debt within the meaning of S. 19, Limitation Act, and he relied upon the case in A. I. R. 1942 Mad. 146.⁶ It may be stated that this decision was approved by a Full Bench decision of the Madras High Court in A. I. R. 1942 Mad. 353.⁷ But the facts in the case relied are entirely different. In the former case the endorsement on a pronote was in these words : "Paid on 15th September 1938 towards this promissory note Rs. 2." In the circumstances it was correctly held that the endorsement although not valid under S. 20 saved limitation under S. 19. The endorsement was expressly pleaded in the plaint as an acknowledgment saving limitation. The Full Bench decision at p. 353 on the other hand decided that the endorsement on the back of the promissory note "paid Rs. 10" cannot be construed as being anything more than a statement of the payment and it could not save limitation. But on the other hand if the endorsement had been "paid Rs. . . . towards this promissory note and endorsed the payment thereon" it would constitute an acknowledgment of the liability within the meaning of S. 19 as the use of the word 'towards' in itself implies that more remains to be paid so that the

6. ('42) 29 A.I.R. 1942 Mad. 146 : I.L.R. (1942) Mad. 405 : 201 I. C. 182, Ramayya v. Anjappa.

7. ('42) 29 A. I. R. 1942 Mad. 353 : I.L.R. (1942) Mad. 590 : 201 I. C. 586 (F.B.), Venkata Chelamiah Sastri v. Annapurnamma.

payment is made on account of a larger sum due under the instrument. The present case exactly falls within the principle laid down in the Full Bench case at p. 353 towards the end of the right hand column. In the present case instead of Rs. 10 the words are 'Rs. 11.' For these reasons, I am of opinion that none of the contentions so ably advanced by the learned advocate is entitled to succeed. I would dismiss this appeal. But in the circumstances I will direct each party to bear his own costs of this litigation in all the Courts.

[10] **Reuben J.**— I agree.

V.R./D.H. *Appeal dismissed.*

[Case No. 135.]

A. I. R. (33) 1946 Patna 407

MEREDITH AND RAY JJ.

Tikait Bishambhar Narain Singh and others—Defendants—Appellants

v.

Ajodhya Ram—Plaintiff—Respondent.

Appeal No. 373 of 1944, Decided on 7th January 1946, from appellate decree of Addl. Sub-Judge, Hazaribagh, D/-13th January 1944.

Evidence Act (1872), S. 91—Agricultural land settled under unregistered hukumnama—Tenancy can be proved otherwise—Registration Act (1908), S. 49.

It is open to a landlord to create a tenancy by giving possession and accepting rent, and clearly, therefore, such a tenancy can be proved by evidence other than the production of the unregistered *hukumnama* by which the tenant takes settlement of an agricultural land from the landlord: ('15) 2 A. I. R. 1915 Cal. 39; ('33) 20 A. I. R. 1933 Pat. 636 and ('30) 17 A. I. R. 1930 Pat. 20. *Rel on*; 18 P. L. T. 1012, *Disting.*; ('24) 11 A. I. R. 1924 Pat. 641, *Expl.* [P 408 C 1]

Registration Act —

('45) Chitaley, S. 49, N. 41, Pt. 1.

('39) Mulla, Page 199, Pt. (1).

R. P. Katriar—for Appellants.

Kedar Nath Varma—for Respondent.

Meredith J.—This is a defendants' second appeal. The suit was for declaration of title and recovery of possession of cadastral survey plots 1786 and 1884 of village Serampur. The plaintiff's case was that he took settlement of these plots from the then landlord by two unregistered *hukumnamas* in the year 1933. Subsequently he entered into possession, and rent was accepted from him by the Serampur estate. The estate was sold up, and came under another proprietor. Thereafter, on 19th July 1942, the son of the previous proprietor dispossessed him. He brought a criminal case, but was referred to the civil Court.

[2] The defence was that the land had been previously settled by the proprietor with his

wife, who remained all along in possession, and the plaintiff's case of settlement was false.

[3] The *hukumnamas* were not taken into evidence as they were unregistered, but both the Courts below have held that the plaintiff's tenancy had been established by proof of his possession, payment of rent, and obtaining receipts from both the proprietors.

[4] Only one point has been taken in second appeal, namely, that the unregistered *hukumnamas* being inadmissible the existence of the tenancy could not be proved by any other evidence. Reliance is placed on the case *Ramautar Singh v. Juthi Tatma* (18 P. L. T. 1012)¹. In that case, however, there is nothing to show that the lease in question was for agricultural purposes where a tenancy can be created orally without any written lease. The decision purports to follow *Janki Kuar v. Brij Bhikan Ojha* (5 P. L. T. 541² at p. 543), a portion of which decision is quoted. What was held in that decision was not that no other evidence to prove the existence of a tenancy could be accepted but merely that

[5] "If the lease or grant is in the form of a document, then the only evidence admissible in proof of the terms of the document is the document itself, and, unless it is registered, even the document itself cannot be admitted in evidence as proof of any transaction affecting the property."

[6] In that case their Lordships expressly stated :

[7] "If the document is not registered it cannot under S. 49 be received in evidence of the lease and in such a case S. 91, Evidence Act, 1872, debars other evidence of the lease being given. But the document may be admissible for a collateral purpose e. g., to show the nature of the defendant's possession."

[8] They also observed :

[9] "Where a written document is defective as a valid and finally concluded agreement such defect may be supplied by the subsequent actings and conduct of the parties, as where subsequent acts of the parties themselves disclose a state of affairs consistent only with the existence of an agreement mutually recognized and acted upon as if the instrument were binding."

[10] It is, in fact, well settled in a series of cases going back to *Amir Ali v. Yakub Ali Khan*, (41 Cal. 347,³) that a tenancy can be proved without proving the lease, if there be any. I need only cite the decision of Dhavle J. in *Ramnandan Prasad v. Tilakdhari Lal*, (A.I.R. 1933 Pat. 636,⁴) wherein his

1. ('37) 18 P. L. T. 1012.

2. ('24) 11 A. I. R. 1924 Pat. 641 : 3 Pat. 349 : 79 I. C. 26 : 5 P. L. T. 541.

3. ('15) 2 A. I. R. 1915 Cal. 39 : 41 Cal. 347 : 25 I. C. 509.

4. ('33) 20 A.I.R. 1933 Pat. 636 : 145 I. C. 944.

Lordship held that a tenancy right under the Bengal Tenancy Act can be proved without proving the lease, if there be one, which is inadmissible for want of registration, and, secondly, the decision of Fazl Ali J. (as he then was) and Chatterji J. in *Shyam Kreshto Shaw v. Ganesh Kahar*, (A.I.R. 1930 Pat. 20,⁵) a case where a trespasser contended that the tenant had acquired no valid right of tenancy in a certain plot, inasmuch as he got settlement by virtue of a *parcha* which was not registered. It was held that the document was admissible in evidence for a collateral purpose to explain the nature and character of possession, and, secondly, that the unregistered document followed by possession had perfected the tenant's title. It is open to a landlord to create a tenancy by giving possession and accepting rent, and clearly, therefore, such a tenancy can be proved by evidence other than the production of the *hukumnama*.

[11] There is no substance in this appeal, and it must accordingly be dismissed with costs.

[12] **Ray J.** — I agree.

V.R./D.H.

Appeal dismissed.

5. ('30) 17 A.I.R. 1930 Pat. 20 : 124 I. C. 634.

[Case No. 136.]

A. I. R. (33) 1946 Patna 408

VARMA AND BEEVOR JJ.

*Narendra Nath Sen and others —
Defendants — Appellants*
v.

*Mahasay Ganesh Prasad Ray and
others — Plaintiffs — Respondents.*

Appeal No. 13 of 1940, Decided on 4th December 1945, from original decree of Sub-Judge, Cuttack, D/- 25th March 1939.

(a) Court-fees Act (1870), Sch. II, Art. 17 — Suit for declaration that plaintiff is nearest reversionary heir filed before summary decision under S. 194, Succession Act — Plaint amended after summary decision without adding a prayer to set aside that decision — Suit held not one under Sch. II, Art. 17 (i).

A suit to set aside a decision of a District Judge under S. 194, Succession Act is a suit to set aside a summary order within Sch. II, Art. (17) (i), Court-fees Act and a fixed court-fee is payable on the plaint in such a suit. [P 410 C 2]

Plaintiff brought a suit for declaration that he being the nearest reversionary heir was entitled to succeed to the property of the last male holder after the death of the widow of the last male holder. After the institution of the suit a proceeding started by the defendant on an application under S. 192, Succession Act was disposed of by the District Judge resulting in an order under S. 194 in favour of the defendant. The plaintiff

thereupon applied for amendment of the plaint by adding a relief as to possession but no prayer for setting aside the decision of the District Judge was asked for:

Held that the suit could not be treated as a suit to set aside a summary decision of the District Judge and consequently Sch. II, Art. 17, Court-fees Act was not applicable : ('29) 16 A. I. R. 1929 Mad. 69 and Beng. L. R. Sup. Vol. 633 (F. B.), *Ref.* [P 410 C 2; P 411 C 1]

(b) Appeal — Maintainability — Suit for declaration of title to properties — Prayer for possession wrongly added — Decree granting both reliefs — Appeal by defendant ignoring decree for possession — Appeal as framed held not maintainable — Civil P. C. (1908), S. 144.

In a suit for declaration of title to certain properties the plaintiff subsequently added a prayer for delivery of possession which was not necessary as the property was in the possession of a receiver appointed by Court. The Court granted both the reliefs. The defendant appealed only against the decree for declaration ignoring the decree for possession:

Held that even if the prayer for delivery of possession could be considered as redundant, the relief granted could not be regarded as redundant. The defendant appellant could not therefore ignore the relief as to possession though wrongly granted by the Court. The appeal as framed was not therefore maintainable. [P 411 C 2; P 412 C 1]

Held further that even if the appeal as it stood were allowed it would result in an infructuous decree in favour of the appellant. Though the principle of restitution is not restricted by the exact words of S. 144, Civil P. C. and though the appellant could get possession in restitution, in fact restitution would not be an effective remedy if the appeal as it stood were allowed as the plaintiff in whose favour the decree for possession remained outstanding could execute it as soon as the defendant appellant obtained possession in restitution. [P 411 C 2]

(c) Civil P. C. (1908), S. 11 — Suit for declaration of title and possession — Right to reliefs depending on same facts — Suit decreed — Appeal by defendant only against declaration of title — Decree for possession would operate as *res judicata* on facts necessary to establish title.

Where in a suit for declaration of title to certain property and for possession of the same, the right to the relief of possession depends on the very same facts which give rise to the plaintiff's title and the Court passes a decree granting both reliefs, the defendant would be precluded by the principle of *res judicata* from challenging in appeal only the decree for declaration of title as the decree for possession which is not appealed against would operate as *res judicata* on the facts necessary to establish that title : ('30) 17 A. I. R. 1930 Mad. 471, *Rel. on.* [P 411 C 2; P 412 C 1]

C. P. C. —

('44) Chitaley, S. 11, Note 2, Pt. 14; O. 41, R. 33, Note 14, Pt. 3.

(d) Civil P. C. (1908), O. 6, R. 17 — Court's power to allow amendment — Extent of, stated — Application for amendment of memorandum of appeal by omitting certain relief — Amendment involving avoidance of court-fees — Amendment held should be allowed.

Although there are some limits to the exercise of a Court's power to allow amendments under O. 6, R. 17, Civil P. C., full powers of amendment must be enjoyed and should always be liberally exercised. One restriction is that there is no power to substitute one distinct cause of action for another. Another principle is that ordinarily leave to amend will be refused where the effect of the proposed amendment is to take away from the respondent a legal right which has accrued to him by lapse of time, but this is a principle which will apply ordinarily and not in every case. [P 412 C 1]

Where the real matter in issue between the parties has been clear to both sides throughout and the defendant against whom a decree for declaration of title and possession has been passed seeks to amend his memorandum of appeal by omitting the relief as to possession which would involve the payment of considerable court-fee, the question involved in the proposed amendment being in substance a dispute between the appellant and the Government or the revenue authorities and with which the plaintiff-respondent is not directly concerned, the amendment should be allowed. [P 412 C 1, 2]

C. P. C.—

(14) Chitaley, O. 6, R. 17, Note 5, Pts. 2 & 3 and Note 9.

M. S. Rao, L. Patnaik, S. C. Palit and P. Sen
— for Appellants.

B. C. De, B. Mahapatra, S. N. Das Gupta,
H. K. Bose, B. K. Pal and S. K. Ray —
for Respondents.

Beevor J.—This is an appeal against a decree of the Subordinate Judge of Cuttack, dated 25th March 1939. The appeal has been filed by defendants 1 to 3 and the plaintiff-respondents have raised a preliminary objection that this appeal is not maintainable. We have heard Mr. B. C. De for the plaintiff-respondents and Mr. M. S. Rao for the appellants on this preliminary objection. Both the appellants and the plaintiff-respondents are claiming the estate of one Rai Bahadur Govind Ballabh Rai who died in July 1896 leaving surviving him his second wife and an unmarried daughter by her and either one or two daughters by his first wife. The second wife Swarnamai succeeded to the estate on his death and remained in possession until her death on 14th September 1935. The plaintiff-respondents then claimed the estate as the nearest reversioners of Gobind Ballabh Rai, their case being that Gobind Ballabh had only one daughter by his first wife and had no descendants who were entitled to inherit still living on the death of the widow Swarnamai. The original defendant in the suit was named Binodini and after her death, her sons, the present appellants, have been substituted in her place. Their case is that Binodini was the second daughter of Rai Bahadur Gobind Ballabh Rai by his first wife and that she

was entitled to the estate on the death of the widow Swarnamai and that on her death the appellants were entitled to the estate. They also denied the plaintiff's claim to be the nearest reversioners of Rai Bahadur Gobind Ballabh Rai.

[2] Disputes arose almost at once after the death of the widow Swarnamai which took place on 14th September 1935. On 14th October 1935 the plaintiffs applied for registration of their names in the Land Registration Department. On 30th November 1935, they applied to the District Judge under S. 192, Succession Act, and their application was registered as Miscellaneous Case No. 55 of 1935. A similar application was filed by Binodini on 13th January 1936, which was registered as Miscellaneous Case No. 3 of 1936. On 20th January 1936, the District Judge appointed an *ad interim* curator of the estate. On 15th April 1936, the plaintiffs filed the suit out of which this appeal arises. The main relief claimed in the plaint as originally filed was

[2a] "that it may be declared that on the death of the widow Swarnamai Dasi the plaintiffs as the nearest reversionary heirs of her husband have succeeded to the disputed properties and that the defendant has no lawful title to the same."

[2b] The only other reliefs claimed were costs and any further relief the Court might award. On 16th May 1936, the District Judge decided Miscellaneous Case No. 3 of 1936 in favour of Binodini and ordered the *ad interim* curator to hand over possession to her. On 19th May 1936 the plaintiffs applied in the suit for appointment of a Receiver and on the same day the Subordinate Judge asked the *ad interim* Receiver not to deliver possession until further orders and on 5th June 1936 the Subordinate Judge appointed Receiver in the suit to take charge of the estate. On 1st July 1936 the plaintiffs amended their plaint by adding to the main relief the words: "That the possession of the plaintiffs be confirmed or in the alternative a decree for recovery of possession be passed in favour of the plaintiffs." Binodini died on 17th January 1938 and the present appellants were substituted in her place, and on 25th March 1939 the trial Court gave the plaintiff-respondents a decree declaring that on the death of the widow Swarnamai the plaintiffs were the nearest reversionary heirs of the late Rai Bahadur Gobind Ballabh Rai and as such they succeeded to the properties described in schedules Ka, Ga except lot No. 7 and Gha and that possession be declared or delivered to them over the said

properties. There were certain incidental directions in the decree which are immaterial for the present purpose.

[3] The present appeal was filed on 24th July 1939 and the prayer portion then claimed that the appeal be allowed and the plaintiffs' suit be dismissed with costs throughout. They paid court-fee of Rs. 30 on the memorandum of appeal. On 23rd December 1939 the Registrar as Taxing officer held that *ad valorem* court-fee was payable and called on the appellants to file deficit court-fee of Rs. 1755. On 20th January 1940 the appellants obtained extension of time for paying court-fees. On 24th January 1940 the plaintiff-respondents obtained delivery of possession of some of the properties decreed to them and on 4th April 1940 they obtained delivery of possession of the remainder. On 20th April 1940, the appellants applied to amend their memorandum of appeal and on 29th April 1940 they obtained an order from this Court permitting them to amend the memorandum of appeal at their risk and in accordance with that order they amended the memorandum on 1st May 1940 by restricting the prayer portion of the memorandum through the addition of the words "(Except delivery of possession of schedules Ka, Gha and Ga except lot No. 7 of the properties mentioned in the plaint)." They also added certain additional grounds which were additional grounds 1 to 7. The Registrar then held that the court-fee was payable *ad valorem* on two particular sums mentioned in additional grounds 6 and 7 but that the court-fee paid was sufficient on the remaining portion of the memorandum of appeal. On 31st July 1940, the appellants abandoned additional grounds 6 and 7 and were, therefore, not required to pay *ad valorem* court-fee on those two sums. On 23rd September 1940 a Bench of this Court directed that the question of maintainability of the appeal be determined at the hearing.

[4] Now the arguments of Mr. B. C. De against the maintainability of the appeal as it stands may be summarised in three propositions. First, that if the appeal as it stands were to be allowed, it would be equivalent to granting a declaration in favour of the appellants and that such a declaration could not be granted firstly because it would be against the principle embodied in the proviso to S. 42, Specific Relief Act, and secondly that it would be infructuous. The second proposition is that S. 144, Civil P. C., or the principle embodied therein would be

of no assistance to the appellants if their decree were allowed. His third proposition is that the trial Court's decree granted two reliefs—one a declaration of title and secondly a decree for possession and that the right to both these reliefs depends on the same facts; and that if there are two reliefs granted both involving the same facts and there is an appeal in respect of only one relief the decree for the other operates as *res judicata* in respect of those facts.

[5] On the other side, the contentions of Mr. M. S. Rao are, first, that the suit was in substance one to alter or set aside a summary decision or order of any of the civil Courts not established by Letters Patent within the meaning of Sch. II, Art. 17 (i), Court-fees Act, and that, therefore, a fixed court-fee was payable both on the plaint and on the memorandum of appeal under that article. His second point was that at the time of the filing of the plaint and even at the time when the plaint was amended on 1st July 1936, the defendants were not in possession of the property but it was in *custodia legis* and, therefore, the plaintiff-respondents were neither required nor legally entitled to sue these defendants, now appellants, for possession and, therefore, the appellants were not required in appeal to get "the redundant relief" granted to the respondents set aside. He contended further that if the Court on appeal would allow his claim and set aside the declaration of title given to the plaintiff-respondents, then the Court in execution or acting on the principle of restitution would revoke the delivery of possession granted to the respondents.

[6] Now Mr. B. C. De for the respondents conceded that if the suit had actually been a suit to set aside a summary order of the District Judge, then a fixed court-fee would have been payable on the plaint under Sch. II, Art. 17, Court-fees Act. He urged, however, that this was not such a suit. On this point, I think, he is clearly correct for two reasons, first, that at the date the suit was filed there was no decision yet given by the District Judge which could be set aside and after the District Judge gave a decision, although the plaint was amended no prayer was added to set aside that decision. Assuming that the plaintiffs had a right to bring a suit to set aside the decision of the District Judge made under S. 194, Succession Act, it does not follow that a suit brought by them in respect of the property after that decision must be treated as a suit to set aside that decision. A Full Bench of the

Calcutta High Court in 7 W. R. 199¹ held that a summary order made under Act 19 [XIX] of 1841 did not operate as a bar to a regular suit to try the title and that such a suit might be brought within twelve years. The provisions of Act 19 [XIX] of 1841 have been replaced by Part VII, Succession Act, including ss. 192 to 210. Section 209 which describes the effect of the decision of a District Judge in a summary proceeding under this part and s. 208 which saves the right of suit are almost exactly in the same wording as ss. 18 and 17 of Act 19 [XIX] of 1841 which are quoted in the judgment of that Full Bench delivered by Sir Barnes Peacock. It is noticeable that at the beginning of his judgment he reserved his opinion on the point whether any suit was maintainable to set aside the summary decision of the District Judge but that case is a clear authority to show that even though a suit may lie to set aside a summary decision, a suit may also lie to recover possession on the basis of title and that such a latter suit is of a different kind from a suit to set aside a summary decision. Although that is an old decision, it has been followed in recent times as for example, by the Madras High Court in 56 M. L. J. 199.² I am, therefore, satisfied that this is not a suit under Sch. II, Art. 17 (1), Courts-fees Act.

[7] On his second point, Mr. M. S. Rao cited to us a number of decisions showing that when a property is in the custody of the Court either through a Receiver or by some officer such as a Curator, the plaintiff may bring a suit under S. 42, Specific Relief Act, without adding a prayer for consequential relief and the court-fee then payable on the plaint is a fixed fee under Sch. II, Art. 17 (iii), Court-fees Act. He also cited decisions of the Madras High Court in 27 Mad. 591,³ 36 Mad. 62⁴ and I. L. R. (1939) Mad. 986⁵ to show that that principle will continue to apply even though the Receiver or officer holding property on behalf of the Court has already been ordered by the Court, on whose behalf he holds, to hand over the property to the defendant before

the plaint is filed, provided he has not by that date actually handed over possession. It does not appear that other High Courts have applied this principle in similar circumstances. It is, however, in my opinion unnecessary to deal with this question more fully because we are not now concerned with what should have been done by the plaintiffs in framing their plaint and paying court-fees thereon, but we are concerned with the memorandum of appeal which arises out of the plaint as it has actually been framed and the decree passed by the lower Court. Even if the Madras view on this last point is accepted, it merely means that the plaintiffs were wrong in adding a prayer for possession in their plaint and that the lower Court was wrong in granting such a relief in the decree. It does not follow that the appellants can ignore that portion of the lower Court's decree which, on this view of the law, would be held to be wrongly granted. Even if the prayer for delivery of possession in the plaint could be considered redundant, I do not think that in effect the relief granted could be regarded as redundant.

[8] As regards Mr. Rao's contention that if he succeeds in displacing the lower Court's decree for declaration of title in favour of the plaintiff-respondents he could succeed in recovering possession by restitution, it is certainly correct that the principle of restitution is not restricted by the exact words of S. 144, Civil P. C., but I do not think that in fact restitution would be an effective remedy if the appeal as it stands were allowed. Accepting for the purposes of argument Mr. Rao's contention on this point, it would follow that on the appeal being allowed the trial Court in restitution should restore the Receiver to possession, and if the Receiver was then directed to give possession to the defendant-appellants the decree for possession passed in favour of the plaintiff-respondents would remain intact and as soon as these defendant-appellants obtained possession the plaintiff-respondents could execute that decree.

[9] I am also of opinion that the third contention of Mr. B. C. De is correct. The plaintiff-respondents have been granted two reliefs first, a declaration of title and secondly a decree for possession. Their right to the second relief depends on the very same facts which give rise to their title. The decree for possession would, therefore, operate as *res judicata* on the facts necessary to establish that title. So long, therefore, as

1. ('67) Beng. L. R. Sup. Vol. 633 : 7 W. R. 199 (F.B.), Loknarain Singh v. Ranee Myna Kooer.

2. ('29) 16 A. I. R. 1929 Mad. 69 : 115 I. C. 504 : 56 M. L. J. 199, Hyder Ali Sahib v. Amiruddin Sahib.

3. ('04) 27 Mad. 591, Vedanayaga Mudaliar v. Vedammal.

4. ('13) 36 Mad. 62 : 12 I. C. 170, Malaiyya Pillai v. T. Perumal Pillai.

5. ('39) 26 A. I. R. 1939 Mad. 853 : I.L.R. (1939) Mad. 986 : 189 I. C. 429, Sundaresa Iyer v. The Sarvajana Sowkiabi Yirdhi Nidhi Ltd.

the decree for possession remains intact it would operate as *res judicata* to prevent the appellants from challenging the decree for declaration of title. On this point, I think, the principle has been clearly set out by Anantakrishna Ayyar J. in A. I. R. 1930 Mad. 471.⁶

[10] I come, therefore, to the conclusion that the appeal as framed is not maintainable. At the conclusion of the arguments Mr. M. S. Rao asked that in the event of the Court holding against his contentions regarding the maintainability of the appeal, his clients should be given an opportunity to amend the memorandum of appeal and pay deficit court-fees thereon. Mr. B. C. De opposed this prayer. We then on 28th November 1945, granted that prayer on certain terms and stated in our order that we would give reasons for our order in the judgment dealing with the maintainability of the appeal. I will now proceed to give the reasons. Under O. 6, R. 17, Civil P. C., the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Although there are some limits to the exercise of this power, it has been stated by the Judicial Committee in 48 Cal. 832,⁷ that full powers of amendment must be enjoyed and should always be liberally exercised. One restriction is that there is no power to substitute one distinct cause of action for another as was stated by their Lordships of the Judicial Committee in that very case. Another principle is that ordinarily leave to amend will be refused where the effect of the proposed amendment is to take away from the respondent a legal right which has accrued to him by lapse of time, but this is a principle which will apply ordinarily and not in every case. This was recognised by the Judicial Committee of the Privy Council as far back as 11 M. I. A. 468⁸ at p. 485. In the present instance it is quite clear that the real matter in issue between the parties has been clear to both sides throughout and the only question involved in the proposed amendment is whether the defendant ap-

pellants in order to have that matter tried would be forced to frame their prayer in a form which would render them liable to pay *ad valorem* court-fees, the amount of which is considerable. The question involved regarding the maintainability of the appeal or the necessity for amendment was, therefore, in substance a dispute between the appellants and Government or the revenue authorities and with this the plaintiff-respondents were only indirectly concerned. It is for these reasons that I consider that the prayer for amendment should be allowed. As a result, if the amendment is made in accordance with the terms of our order dated 28th November 1945, the appeal would proceed, but if the terms of that order are not carried out, this appeal will stand dismissed with costs as not maintainable.

[11] **Varma J.** — I agree.

K.S. *Order accordingly.*

[Case No. 137.]

A. I. R. (33) 1946 Patna 412

SHEARER AND IMAM JJ.

Pagla Kahar and another—Petitioners
v.
Emperor.

Criminal Revn. No. 1052 of 1945, Decided on 8th January 1946, from order of Addl. Sessions Judge, Patna, D/- 31st May 1945.

Criminal P. C. (1898), S. 349 (1) — Reference under—Mere use of expression that he convicted accused in recording opinion by Magistrate is erroneous and irregular—Such irregularity does not vitiate proceedings under S. 349.

What a Magistrate is required to do under S. 349, cl. (1), Criminal P. C., is to record his opinion that the accused is guilty of the offences charged and submit the proceedings to the Sub-divisional Magistrate. Where a Magistrate submits the entire proceedings to the Sub-divisional Magistrate but in expressing his opinion uses the expression that he convicted the accused, the language used is erroneous. There is however nothing in S. 349 to suggest that if a Magistrate states that he convicts the accused, the proceedings under that section are vitiated and the reference is illegal. At best it is irregular for the Magistrate to have stated that he convicted the accused but the irregularity does not vitiate the proceedings: ('28) 15 A. I. R. 1928 Bom. 240, *Rel. on*; ('24) 11 A. I. R. 1924 Pat. 764, *Ref.* [P 413 C 1, 2]

Cr. P. C.—

('46) Chitale, S. 349, N. 9, Pts. 2, 3.

('41) Mitra, S. 349, Page 1165, Para. 1009.

J. N. Varma and Devendra Prasad —
for Petitioners.

*K. D. Chatterji—*for the Crown.

Imam J. — The petitioners Pagla Kahar and Ramkishun Dusadh were sentenced to nine months' rigorous imprisonment under S. 380, Penal Code, for having committed

6. ('30) 17 A.I.R. 1930 Mad. 471 : 125 I. C. 247, *Pichai Konar v. Narasimha Rama Iyer.*

7. ('22) 9 A. I. R. 1922 P. C. 249 : 48 Cal. 832 : 48 I. A. 214 : 63 I. C. 914 (P. C.), *Ma Shwe Mya v. Maung Mo Hnaung.*

8. ('66-67) 11 M. I. A. 468 : 9 W. R. 9 (P. C.), *Mohammed Zahoor Ali v. Mt. Roota Koer,*

theft in the house of one Govind Singh in village Pachmahla, Police Station Barh. The case was before a second class Magistrate for trial who examined witnesses and at the conclusion of the recording of the evidence came to the view that the case of some of the accused who were on trial along with the petitioners deserved a higher sentence than he could impose, having regard to previous convictions against them, and referred the proceedings under S. 349, Criminal P. C., to the Sub-Divisional Magistrate. The Sub-Divisional Magistrate having perused the evidence and having heard arguments came to the conclusion that the prosecution evidence against the petitioners was satisfactory and accordingly convicted them under ss. 457 and 380, Penal Code. Against their conviction the petitioners filed an appeal before the Sessions Judge of Patna who dismissed it after a full hearing. At the time of the admission of this application in this Court I was of the opinion that the case against the petitioners was concluded by findings of fact. It was, however, urged at the time of the admission that the second class Magistrate, when referring the proceedings to the Sub-Divisional Magistrate under S. 349, Criminal P. C., instead of recording his opinion had actually convicted the accused, which was entirely illegal. Reliance was placed upon the decision of this Court in 5 P. L. T. 571.¹ Having regard to this decision of a Division Bench of this Court, there was no alternative but to admit the application for further consideration of the point raised.

[2] Mr. Jagdish Narain Varma, appearing for the petitioners before us, has not seriously urged that there was any such illegality in the proceedings as to vitiate them. In 52 Bom. 456² the Bombay High Court recognised that it was wrong on the part of a Magistrate to record a conviction when he was making a reference under S. 349, Criminal P. C. But if he did do so, it would be treated as a nullity and did not require formal quashing. If I may say so, I respectfully agree with the decision of the Bombay High Court. What a Magistrate is required to do under S. 349, cl. (1), Criminal P. C., is to record his opinion and submit the proceedings. The very act of submitting the proceedings to the Sub-Divisional Magis-

trate in this case is enough, in my opinion, to show that in the opinion of the second class Magistrate the accused were guilty of the offences charged. If in expressing his opinion the second class Magistrate has used the expression that he convicted the accused, the language used is erroneous, but I cannot regard it to mean that he is convicting the accused of the offence. The second class Magistrate made it quite clear in his order that the entire proceedings were being submitted to the Sub-Divisional Magistrate. We have also to remember that Magistrates with powers of second and third class may use expressions which are unhappy, but I do not think there is anything in S. 349 to suggest that, if the Magistrate states that he convicts an accused, that necessarily the proceedings under S. 349 are vitiated and the reference to the Sub-Divisional Magistrate under that section is illegal. Reading the order as a whole, I am of the opinion that the second class Magistrate in this case meant no more than this that in his opinion the accused were guilty, and such of those as had previous conviction, deserved a higher sentence than he could inflict and accordingly he was making a reference under S. 349. Even in the decision of this Court in 5 P. L. T. 571¹ the conviction of the accused was not set aside but the sentence was reduced having regard to the circumstances of that case. I think one may well be justified in saying that at best it was irregular for the second class Magistrate to have stated that he convicted the accused, but it is an irregularity which does not vitiate the proceedings.

[3] On the facts, the matter is concluded by findings of fact, and having read the judgments of the Courts below once again I can see no reason to reconsider the view which I took at the time of the admission of this application that there was anything in the judgments which would justify interference on facts. The question of sentence was urged on behalf of the petitioners. As I have already stated, they have been sentenced to nine months' rigorous imprisonment for theft in a house. Under S. 380 the offence is punishable up to seven years' rigorous imprisonment, and in this particular case not less than Rs. 5000 worth of property was stolen by the thieves who invaded the house of Govind Singh. I do not think that the sentence of nine months' rigorous imprisonment is at all severe in the circumstances. It was, however, urged that for a considerable period before the conviction the

1. ('24) 11 A. I. R. 1924 Pat. 764 : 3 Pat. 1015 : 82 I. C. 284 : 5 P. L. T. 571, Prayag Gope v. Emperor.

2. ('28) 15 A. I. R. 1928 Bom. 240 : 52 Bom. 456 : 111 I. C. 664, Emperor v. Narayan Dhaku.

petitioners had been in custody. I am inclined to think that probably that is the reason why the Sub-Divisional Magistrate imposed a sentence of nine months only for this serious offence. There is no reason to interfere with the sentence in this case and the application is dismissed.

Shearer J.—I agree.

D.R./D.H. *Application dismissed.*

[Case No. 138.]

A. I. R. (33) 1946 Patna 414

FAZL ALI C. J. AND MANOHAR LALL J.
Commissioner of Income-Tax, B. & O.

v.

S. K. Sahana and Sons, Kodarma.

Misc. Judicial Case No. 88 of 1945, Decided on 12th December 1945, reference made by Income-tax Appellate Tribunal, Bombay.

(a) Income-tax Act (1922), S. 10 (2) (vi)—Assessee keeping account from April to April—Assessee transferring business along with machinery and building on 1st January of accounting year—Department allowing depreciation only for eight and half months—Assessee held was entitled to full amount of depreciation.

There is no such provision in the Income-tax Act as would justify that if the machinery etc. is not the property of the assessee throughout the year then the period for which it was the property of the assessee should be calculated and depreciation should be allowed in proportion to such period. [P 415 C 1]

Where, therefore, the assessee, who kept his account according to the Bengali year from April to April, transferred all his business in mica and rice mill along with the machinery and building to a joint stock company on the 1st January of the accounting year and the department allowed depreciation only for eight and half months upon the view that the assessee ceased to be the owner of the mill and building on 1st January and, therefore, could not claim depreciation for the entire twelve months :

Held that the assessee was entitled to the full amount of depreciation under S. 10 (2) (vi) irrespective of the period of user : ('46) 33 A.I.R. 1946 Pat. 39, Rel. on. [P 415 C 1]

(b) Interpretation of statutes—Construction of taxing statute—Equitable rule cannot be invoked.

Equity and taxation are at poles asunder and the Court cannot invoke an equitable rule in the construction of a taxing statute. [P 415 C 1]

S. N. Dutt—for Petitioner.

R. S. Chatterji—for Opposite Party.

Manohar Lall J. — This is a reference at the instance of the Commissioner of Income-tax, Bihar and Orissa, by the Appellate Income-tax Tribunal asking for the opinion of the Court on the question :

[2] "Is the assessee entitled to the full amount of depreciation under S. 10 (2) (vi), Income-tax Act irrespective of the period of user?"

[3] The facts are not in dispute. The assessee is a Hindu undivided family and had a business in mica and rice mill. The assessee keeps his account according to the Bengali year from April to April. In the assessment for the year 1940-41, the assessee claimed depreciation for machinery and building for the entire period of twelve months instead of eight and half months even though on 1st January 1940, the assessee had transferred all his business in mica and rice mill along with the machinery and building to a joint stock company. The Department allowed depreciation only for 8½ months upon their view that the assessee ceased to be the owner of the mill and building on 1st January 1940, and, therefore, could not claim depreciation for the entire twelve months. The Appellate Tribunal, however, held that the Income-tax Act did not authorise any apportionment of the depreciation allowance in regard to time. Hence the reference at the instance of the Commissioner.

[4] The relevant provisions of the Act are contained in S. 10 (2) (vi) which entitles the assessee to claim depreciation of the buildings, machinery, plant or furniture used by him for the purpose of business, profession or vocation. It is not disputed that the assessee was the owner of the building, machinery, etc., during the accounting year. I do not see any provision in the Act which authorises an apportionment of depreciation on the assessee having sold the machinery or plant during the accounting period. The Legislature was aware that a machinery or plant might be sold or discarded during the accounting year and in such events it is provided by S. 10 (2) (vii) that the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its scrap value is a deductible allowance and also that where the amount for which the machinery or plant is sold exceeds the written down value, the excess is to be deemed to be the profits of the previous year in which the sale took place.

[5] Learned advocate for the assessee also drew attention to S. 10 (3) which provides that where a building or machinery for which allowance is due is not wholly used for the purpose of business, profession or vocation, the allowance is restricted to a fair proportional part of the amount which would be allowable if such building or

machinery was wholly so used. He argues that the Legislature has directed an apportionment only in such a case and that there is no justification for extending the rule of apportionment to other cases. The contention, in my opinion, is sound. Our attention was drawn to a recent case decided by this Bench on 15th August 1945: 1945 I. T. R. 415.¹ In that case my Lord the Chief Justice, who delivered the judgment of the Bench, negatived the contention raised on behalf of the Income-tax Department as to the meaning sought to be given to S. 10 (3) and observed:

[6] "The words 'not wholly used for the purposes of business, profession' etc., do not mean not used throughout the year or during the whole of the year in question. They mean that the building, machinery etc. have not been used exclusively for the purpose of the profession or vocation, that is to say, they have been used for other purposes also. There is no such provision in the Act as would justify the view that if the machinery is not used throughout the year, then the period for which it has worked should be calculated and depreciation should be allowed in proportion to such period."

[7] The argument advanced on this occasion before us on behalf of the Department is similar. I am of opinion that there is no such provision in the Act as would justify that if the machinery is not the property of the assessee throughout the year then the period for which it was the property of the assessee should be calculated and depreciation should be allowed in proportion to such period. It is not denied that the assessee as the owner of the machinery and building was using it during the accounting period for the purpose of business and he is being assessed on the profits which he made for the period during which he was the owner. It was contended by the learned standing counsel that the acceptance of this view is most inequitable as it would enable both the transferor and the transferee to claim full deduction for the depreciation although the machinery etc., have been used by either of them only for a broken period in the same year. But it has been rightly pointed out that equity and taxation are as poles asunder and the Court cannot invoke an equitable rule in the construction of a taxing statute.

[8] For these reasons, in my view, the Appellate Tribunal has come to a correct conclusion, and I would answer the question in the affirmative. The assessee is entitled

ed to the costs of this Court: hearing fee Rs. 250.

Fazl Ali C. J. — I agree.

V.R./D.H. *Reference answered in the affirmative.*

[Case No. 139.]

A. I. R. (33) 1946 Patna 415

AGARWALA AND SHEARER JJ.

Mrs. S. Misra alias S. Lazarus —

Appellant

v.

Sm. Mangala Kumari Devi —

Respondent.

Appeal No. 57 of 1945, Decided on 29th January 1946, from original order of Dist. Judge, Gaya, D/- 29th January 1945.

(a) Will—Recital incorrect or untrue— Will is nevertheless valid.

Even if the recital contained in the will is incorrect or even untrue, the will is nevertheless a valid will unless it is subsequently revoked by the testator. [P 416 C 1]

(b) Insurance — Insured assigning policy during lifetime to certain person — After his death his heir asking for succession certificate is not entitled to money due under policy.

Where an insured has assigned the policy during his lifetime to a third person, the money due under it does not form part of his estate and after his death his heir asking for a succession certificate is not entitled to the money due under the policy. [P 416 C 2]

(c) Succession certificate — Application by heir for succession certificate to enable him to recover money due under life insurance policy — Policy validly assigned to someone else — Court has no jurisdiction to grant certificate.

When an application is made by the heir of a deceased person for a succession certificate to enable him to recover money due under a life insurance policy, and when it appears to the Court to which the application is made that the policy in question has been assigned to someone else the assignment having been acknowledged by the insurance company as a valid assignment, the Court has no jurisdiction to grant the certificate asked for. [P 417 C 1]

Lal Narain Sinha and Shambhu Prasad Singh — for Appellant.

Sarjoo Prasad and Satyendra Narain Sinha — for Respondent.

Shearer J. — The appellant, who describes herself as Mrs. S. Misra alias S. Lazarus, was born at Jubulpur of parents who were Indian Christians. In or about 1928, when she must still have been a very young girl, the appellant was employed as a nurse at the Bhagalpur hospital and there made the acquaintance of a Sub-deputy Magistrate, Pandit Nand Kumar Misra. Towards the end of the following year she went to Chapra, where Pandit Nand Kumar Misra had been transferred, and joined him and lived with him continuously until his

1. ('46) 33 A. I. R. 1946 Pat. 39 : 24 Pat. 630 : 1945-13 I. T. R. 415, Commissioner of Income-tax, B. & O. v. Dalmia Cement Co., Ltd.

death which occurred on 1st February 1941 in the hospital at Dumka. Before meeting the appellant, Pandit Nand Kumar Misra had married the respondent, Srimati Mangala Kumari, and on 28th March 1941, Srimati Mangala Kumari applied to the District Judge of Gaya for a succession certificate to enable her to collect three sums of money which she asserted, were due to the estate of her husband. The learned District Judge granted the certificate and subsequently the appellant applied to have the certificate revoked. This application was rejected and the appellant has now appealed against the order rejecting it.

[2] The appellant asserts that before she went to live with Pandit Nand Kumar Misra at Chapra she was converted to Hinduism and went through a ceremony of marriage with him according to Arya Samaj rites. On 5th September 1938, Pandit Nand Kumar Misra executed a document nominating the appellant as the person to whom any money standing at his credit in the General Provident Fund should be paid in the event of his death. On 8th July 1940, he executed a will in her favour, and on 9th November 1940, he executed a deed, assigning the sum due under an insurance policy, which he had taken out on his life to her. Some two years earlier, on 23rd December 1938, he had executed a similar deed of assignment, but this assignment the insurance company had declined to register on the ground that it had not been properly stamped. In each of these documents Pandit Nand Kumar Misra described the appellant as his second wife. His conduct in so describing her in a series of documents, each one of which was attested by some colleague of his in the service to which he belonged, is, I am inclined to think, a circumstance which goes to suggest, not merely that the appellant may have gone through some ceremony of marriage with him, but that, whether it was a valid ceremony or not, Pandit Nand Kumar Misra believed it to be a valid one. This matter is not, however, one of any importance. Even if the recital contained in the will is incorrect, or even untrue, the will is nevertheless a valid will unless it was subsequently revoked by the testator. It appears that on 30th January 1941, when Pandit Nand Kumar Misra was in the hospital at Dumka, he executed and registered a deed purporting to revoke the will. I am myself inclined to think that the onus lay heavily on the respondent to show that when he executed this deed, Pandit Nand Kumar Misra was

perfectly well aware of what he was doing and of the consequences to the appellant, and that this was perhaps not sufficiently appreciated by the Court below. It is, however, quite unnecessary for me to go into the matter and decide whether or not the will was revoked. It is enough to say that, as the right if any which the appellant had as against the respondent to the money at the credit of Pandit Nand Kumar Misra in his Provident Fund and the sale proceeds of his effects depends wholly on the validity of the will, it was incumbent on her to apply for and obtain probate of it. No steps having been taken by her to obtain probate, and it being quite impossible on the evidence which she adduced in the Court below to say that she and the respondent are the co-widows of Pandit Nand Kumar Misra, the learned District Judge was correct in declining to revoke the certificate in so far at least as two of the three debts due to the estate of Pandit Nand Kumar Misra are concerned.

[3] The position, however, with regard to the other debt, namely, the money due under the insurance policy is very different. It was not denied that Pandit Nand Kumar Misra had assigned the policy, and, in any case, this was clearly proved by the entries which had been made in the register of the company. Now, if Pandit Nand Kumar Misra assigned the policy during his lifetime, the money due under it did not form part of his estate and the respondent who asks for a succession certificate in her capacity as the heir of her deceased husband was not entitled to it. There is no evidence to show, and it was not even contended in the Court below that for some reason or other the assignment was not a valid assignment. All that was said was that the appellant had failed to prove that the policy had been assigned to her. Under S. 38 (1), Insurance Act, such a deed of assignment has to be attested, and Mr. Huda, the Deputy Magistrate who is said to have attested this deed, was not called by the appellant as a witness. Very possibly the reason why he was not called was that the deed of assignment was not in the possession of the appellant. The insurance company had sent it to the home address of Pandit Nand Kumar Misra and there is, I think, reason to suppose that either the respondent or her brother-in-law was thus able to get control of it and suppress or destroy it. The appellant did not, however, formally call on the respondent to produce the document and in consequence

it was incumbent on her to call the attesting witness as a condition precedent to giving secondary evidence of its contents. The circumstance that the appellant omitted to prove the deed of assignment may be a reason for declining to give her the succession certificate for which she asked but is clearly not a reason for declining to revoke the certificate which had previously been granted to the respondent. If the certificate is permitted to stand, certain very awkward consequences will ensue. The policy having been assigned and notice of the assignment having been given to the insurance company and acknowledged, the company is bound under sub-s. (5) of S. 38, Insurance Act to pay the money due under the policy to the assignee. If the certificate which has been granted to the respondent is allowed to stand, and the respondent applies to the insurance company for payment, the insurance company will necessarily refuse to pay the money to her and will either await a suit by her or will itself be driven to institute an inter-pleader suit, asking that the conflicting claims of the appellant and the respondent to this money be adjudicated on.

[4] The learned Government Pleader, who appeared for the respondent, said that under S. 384, Succession Act, no appeal lay against an order declining to revoke a certificate. For this Mr. Sarjoo Prasad relied on the decision in 6 Cal. 40¹. That, however, was a decision on Act 27 [XXVII] of 1869, and can have no application here. The Bombay High Court in 19 Bom. 821,² at p. 825, was inclined to the view that when an application had been made, not merely to revoke a succession certificate but also to grant a certificate to the applicant himself, an appeal lay against an order dismissing the application. It also pointed out that in any case S. 19, Succession Certificate Act—and S. 384, Succession Act reproduces these provisions—reserved the revisional powers of the High Court as supplementing its appellate jurisdiction. When an application is made by the heir of a deceased person for a succession certificate to enable him to recover money due under a life insurance policy, and when it appears to the Court to which the application is made that the policy in question has been assigned to someone also the assignment having been acknowledged by the insurance company as a valid assignment, the Court has no jurisdic-

tion to grant the certificate asked for. In such circumstances it is obviously impossible to say that the applicant for a succession certificate has made out a *prima facie* case that he is in person entitled to collect the debt. In the application which the respondent made for a certificate it was stated that "there is no impediment under S. 370 or under any of the provisions of the Act or any other enactment to the grant of the certificate hereby prayed for, or to the validity thereof if granted by the Court." This was clearly "an untrue allegation of fact essential in point of law to justify the grant" and under cl. (c) of S. 383, Succession Act, the learned District Judge should have revoked the certificate. The appeal will be allowed to this extent that the succession certificate which has been issued to the respondent will be amended by deleting from it item No. 1, namely, the sum of Rs. 1525 due by the National Insurance Company Limited, Calcutta, under policy No. 1850. As success has been divided, there will be no order for costs.

[5] **Agarwala J.** — I agree.

D.S./D.H. *Appeal partly allowed.*

[Case No. 140]

A. I. R. (33) 1946 Patna 417

AGARWALA AND SHEARER JJ.

Jan Muhammad — Appellant. v. Shital Prasad and another—Respondents.

Appeal No. 53 of 1944 Decided on 23rd January 1946, from original order of Sub-Judge, Purnea, D/-5th February 1944.

Limitation Act (1908), S. 5—Application for review—Delay—Disturbed state of Country not permitting to make application for or to take delivery of copies of documents held sufficient cause.

Where owing to the fact that the whole country was in a disturbed state and it was not easy for litigants to appear in Court to make applications or to take delivery of copies of documents which they had applied for within a reasonable time of the copies being ready, there was a few days' delay in making an application for review :

Held, that in the circumstances the delay should be condoned. [P 418 C 2]

Limitation Act.

(42) Chitaley, S. 5, N. 34.

G. P. Shahi—for Appellant.

S. C. Mazumdar and Rati Kant Choudhury —
for Respondents.

Agarwala J. — This is an appeal by the auction-purchaser. The material facts are that the respondent, in execution of a decree for money which he obtained against Shital Prasad and others, had the judgment-debtor's house put up for sale. At the execution sale the house was purchased by the appellant on 8th July 1941. On 6th August the

1. ('81) 6 Cal. 40, Nanuk Prasad v. Lall Nitya Lall.

2. ('95) 19 Bom. 821, Manchbaram v. Kali das.

judgment-debtors had made an application to the Court for leave to deposit the decretal amount and other dues under O. 21, R. 89. It has now been found as a fact that the actual deposit was made on 7th, although in the Court below there was a dispute as to whether the date of deposit was the 7th or the 8th. Without giving notice to the decree-holder the Court set aside the sale by an order dated 11th August 1941. Notice was not given to the decree-holder because, the Court observes, he knew of the application. The auction-purchaser preferred an appeal against the order setting aside the sale. On the date fixed for the hearing of the appeal, namely, 13th March 1942, the Advocate for the judgment-debtors was not present, with the result that the appeal was allowed *ex parte*, and the order of 11th August setting aside the sale, was vacated. On 20th March the judgment-debtors applied for a copy of the appellate order. This copy was ready for delivery on 1st April and was actually delivered to him on the 7th. He was advised to apply to this Court in revision against the appellate order, and in consequence of this advice he swore an affidavit in this Court on 14th May 1942, for the purpose of supporting an application in revision.

[2] The Court was, however, by that time closed for the long vacation and did not re-open until 20th July, on which date an application in revision was filed. This was listed for admission on 5th August, on which date it was summarily dismissed. Thereafter, the judgment-debtors applied for a copy of the judgment on 13th August and a copy was ready for delivery on 22nd. He did not, however, take delivery until 28th September. The Civil Courts closed for the long vacation on 9th October and re-opened on 11th November. On that date the judgment-debtors presented an application for review of the appellate order of 13th March. The question that arises is whether this application was within time. The Court below has allowed the judgment-debtors to exclude in the calculation of the ninety days, which the law allows for an application for review, the two periods spent in obtaining copies of judgment, the period during which an application in revision was pending in this Court and also the period that this Court was closed for the summer vacation and the court below was closed for the annual vacation. Even excluding all these periods, the application for review was a few days late. It is not necessary to specify the details in this judgment, but consideration must be given to the fact that

the whole country was in a disturbed state from early in August until well into the winter and it was not easy for litigants to appear in court to make applications or to take delivery of copies of documents which they had applied for within a reasonable time of those copies being ready. In these circumstances, in my view, the judgment-debtors are entitled to ask the court to condone the delay which occurred in making the application for review, and I am not, therefore, prepared to interfere with the order of the court below. The appeal is dismissed, but without costs.

[3] **Shearer J.**—I agree.

G.B./D.H.

Appeal dismissed.

A. I. R. (33) 1946 Patna 418 [C. N. 141]
MANOHAR LALL AND DAS JJ.

P. Ramdas and another — Petitioners.
v. Emperor.

Criminal Revn. No. 187 of 1944, Decided on 10th April 1945, from order of Agency Sessions Judge, Koraput, D/-27th September 1944.

Defence of India Rules (1939), Rr. 121 and 81 (4)—Export of rice by *K* in contravention of order of competent authority — Rice carried on by coolies engaged by *K* — Persons merely accompanying coolies held could not be convicted under R. 121.

One *K* engaged some coolies for the purpose of carrying rice from a place in Orissa to a place in Madras Presidency. While the rice was being carried by the coolies, they were detected with the result that *K*, and the coolies along with two persons *A* and *B* who were merely accompanying the coolies were put on trial for an offence under R. 81 (4) read with R. 121, Defence of India Rules. *K* was acquitted but the coolies and the two persons *A* and *B* accompanying them were convicted:

Held that if anybody was responsible for the export of the rice in contravention of the orders of the competent authority, it was *K*. The fact that *A* and *B* merely accompanied the coolies could not bring them within the mischief of R. 121, Defence of India Rules. The conviction of *A* and *B* was not, therefore, proper. [P419 C 1,2]

P. C. Chatterji — for petitioners.

The Advocate General — for the Crown.

Das J. — The two petitioners have been convicted under the provisions of Sub-r. (4) of R. 81, Defence of India Rules, and they have been sentenced to rigorous imprisonment for four months each. The facts alleged against the two petitioners are the following. It appears that on 8th December 1943, 19 coolies were carrying loads of rice from the Koraput area of Orissa to a place in Madras. The two petitioners, it is alleged, were accompanying the 19 coolies. They were detected on the way by the supervising staff, and the coolies were taken to the police station. The person who had employed these coolies for the purpose of carrying rice to Madras was a man called N. Kamaraju.

He was also put on trial along with the two petitioners, but was acquitted by the learned Magistrate. Originally, the 19 coolies were put on trial and were convicted. Subsequently, on their statements, the two petitioners along with their master Kamaraju were put on trial with the result indicated above. As I have stated above, the two petitioners have been convicted under the provisions of sub-r. (4) of R. 81, Defence of India Rules read with R. 121 of the said rules.

[2] On behalf of the petitioners it has, firstly, been contended that the charge related to an occurrence on 8th December 1943, whereas the date mentioned in the offence report shows that the offence was committed on 7th December 1943. We have examined the offence report, and it appears that in one of the columns the date of offence is mentioned as 8th December 1943, whereas in another column the date is mentioned as 7th December 1943. The evidence that was given in the case showed that the offence was committed on 8th December 1943, and the charge also related to that particular date. No grievance was made in the course of the trial regarding the date mentioned in the charge. Even in the grounds mentioned in the petition no point has been taken that the charge mentioned a wrong date. I am unable, therefore, to accept the contention that a wrong date was mentioned in the charge, and that even if a wrong date was mentioned in the charge, it caused any prejudice to the petitioners.

[3] The petitioners are, however, entitled to succeed on another point. The evidence shows that the two petitioners were merely accompanying the coolies who were carrying the rice. The evidence of the coolies clearly shows that they were carrying rice at the instance of and under the orders of their employer N. Kamaraju, who has been acquitted by the learned Magistrate. The learned lower appellate Court has observed in the judgment that it is rather illogical to accept the evidence of the accomplices against the two petitioners while rejecting it against the principal man, namely, Kamaraju, who had actually employed the coolies to carry rice from Orissa to Madras. As a matter of fact, all that is alleged against the two petitioners is that they were accompanying the coolies who were carrying rice from Orissa to Madras. If anybody is responsible for the export of rice from Orissa to Madras in contravention of the orders of the competent authority, it is N. Kamaraju who has unfortunately been acquitted by the learned

Magistrate. The mere fact that the two petitioners accompanied the coolies does not, in my opinion, bring them within the mischief as mentioned in R. 121, Defence of India Rules.

[4] It has also been contended before us that the coolies were in the position of accomplices, and, in the absence of any corroboration of their evidence, the conviction of the two petitioners cannot be sustained. It is unnecessary to determine in this case whether the coolies were in the position of accomplices or not. As I have stated above, all that is alleged against the petitioners is that they accompanied the coolies under the orders of their master N. Kamaraju.

[5] That being the position, the conviction of the petitioners cannot be sustained. The result, therefore, is that the application is allowed, and the conviction and sentences passed against the petitioners are set aside. The petitioners are acquitted and discharged from bail.

[6] **Manohar Lall J.** — I agree.

K.S./D.H. *Convictions set aside.*

A. I. R. (33) 1946 Patna 419 [C. N. 142]

FAZL ALI C. J. AND RAY J.

Deonath Sahay — Appellant v. Lekha Singh and others — Respondents.

Appeal No. 140 of 1944, Decided on 14th February 1946, from decision of Addl. Sub-Judge Gaya, D/- 16th December 1943.

(a) **Hindu Law — Coparcener — Congenital disqualification, effect of —** Congenitally lame coparcener is not entitled to partition of his share in family property or separately possess it — He cannot by transfer *inter vivos* convey his rights to assignee.

There is no decided case or any text of Hindu law to establish that a congenitally disqualified person is excluded from being a coparcener. Such a person is a coparcener for certain purposes with rights to descend to his natural heirs present or to come into being on his taking a married life if he so chooses. [P 423 C 1,2]

But a congenitally lame coparcener is not entitled to partition of his share in the family property or to separately possess it, nor can he by any transaction *inter vivos*, convey such a right to his assignee; *Case law and texts discussed.* [P 423 C 2]

Hindu Law. — ('40) Mulla, P. 100, S. 98 (b), Pt. r, P. 386, S. 318; ('38) Mayne, P. 550, Para. 438, Pt. (c), P. 727, Para. 599.

(b) **Precedent —** Every judgment must be read as applicable to particular facts proved or assumed to be proved — Case is an authority for what it actually decides.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, in that case, since the generality of expression that may be found are not intended to be expositions of the whole law but governed or qualified by the

particular facts of the case in which such expressions are found; that is, a case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow from it logically. [P 423 C 1]

C. P. C.—('44) Chitale, Preamble, Note 15, Pts. 9 and 10.

Rajkishore Prasad—for Appellant.

Lalnarin Sinha and K. N. Varma —
for Respondent.

Ray J.—This second appeal is preferred by the plaintiff-appellant. He started the suit for partition of his purchased one-third share in lands comprised in khatas Nos. 79 and 80 of village Mohamadpur tauzi No. 3666. The sale deed effecting this purchase was executed by defendant 12, Dwarka Singh, son of Banshi deceased, on 12th May 1939. The plaintiff's claim was resisted by defendants 1 to 11, who are members of the same family as Dwarka. Admittedly defendants 1 to 11 are the heirs and successors of Banshi's three brothers Lekha Singh, Tota Singh and Chulhan Singh. The defendant's case is that Banshi alone out of the four brothers separated and, by an arrangement agreed to between them, migrated from Mohamadpur to another village by name Eknar giving up his interest in the lands of Mohamadpur in lieu of some lands at Eknar. In the alternative, it was contended that at any rate for more than statutory period defendants 1 to 11 and their predecessors-in-interest had been in exclusive possession of the land appertaining to the khatas mentioned above and thus had acquired a right by adverse possession, or at any rate, Dwarka, a congenital cripple, acquired no interest in the joint family estate left by Banshi and had no interest to convey to the plaintiff by the sale deed. The plaintiff, therefore, was not entitled to any relief. Both the learned Courts below came to a finding that the family arrangement pleaded by the defendants was not established. Banshi was recorded in respect of the disputed khatas along with his three brothers in the record of rights, the presumption of correctness whereof, it was concurrently held by the Courts below, had not been rebutted. Similarly also the story of adverse possession was ruled out as not proved. The learned lower Court has observed in this connection :

[2] "As regards Banshi Singh, however, the defendant's own evidence indicated that he was in possession jointly with the other defendants. He admitted the survey entry to be correct. It was also admitted that he came to Mohamadpur during survey operation. The possession of Banshi Singh in relation to the defendants was that of a co-owner and the learned Munsif is right when he says that unless, a case of ouster was made out the plea of adverse possession or limitation could not prevail. I also agree with the

finding of the learned Munsif that the defendants did not place any case of ouster and consequently there was no limitation or adverse possession."

[3] It will not be out of place to quote the passage of the learned Munsif with which the lower appellate Court agreed as shown above. He said :

[4] "Although the evidence on the side of the plaintiff as to Banshi's possession is not very strong it would seem from the khatian Ext. 6 that Banshi was one of the co-sharers of the land of khatas 79 and 80 of Mohamadpore along with Lekha and others. Consequently the possession of Lekha and others over the land would be tantamount to possession of all interested co-sharers on the basis of the well recognised principle of law that the possession of co-sharer is possession of all interested, except where ouster is established by cogent and satisfactory evidence although it is not so before me . . . Dwarka's position must be same as of his father in regard to the question of possession over the lands of khatas nos. 79 and 80."

[5] Notwithstanding Banshi's death having taken place more than 12 years before the institution of the suit, both the learned Courts below came to a clear finding that defendants 1 to 11 had not, by then, acquired a right by adverse possession in respect of Banshi's share in the disputed khatas. There was some controversy in the Courts below about the share of Banshi in the disputed lands. The plaintiff by virtue of his purchase and basing his claim on the recitals in the deed claimed one-third but the Courts below held, relying upon the entries in the record of rights, that Banshi's share was one-fourth. This controversy about share was not renewed before us. It remains to consider the only other plea of defendants 1 to 11, namely, that the plaintiff's vendor Dwarka was disqualified from inheriting under the Hindu law on account of his congenital idiocy and lameness. Congenital idiocy has not been found as a fact. Congenital lameness, however, was assumed though not found by the learned Munsif, and on discussing the law, he came to the conclusion that the disqualification under the Hindu law affects the right of inheritance but not exactly the right of survivorship. He acceded to the contention of the defendants to the extent that under Mitakshara school of Hindu law, persons suffering from congenital disability are excluded from having a share on partition of joint family estate and that its efficacy was not confined to a case of inheritance only. But he was of opinion that if in a joint family consisting of a disqualified member and another not having such defect, the latter dies, the entire family property must vest in the member suffering from disqualification by right of survivorship, and it cannot go to another family so long as the

disqualified member lives. For this proposition of his, he relied upon the case in A. I. R. 1934 Pat. 373¹. In this view of the position taken by him, he held that on the death of Bansi, Dwarka, being the only surviving member of the family, acquired a valid interest in khatas nos. 79 and 80, and that he was competent to transfer and thereby convey a title in them to the plaintiff to the extent of his share, that is one-fourth. He, therefore, decreed the plaintiff's suit.

[6] The defendants took up an appeal to the lower appellate Court who, instead of assuming congenital lameness of Dwarka, recorded a clear finding holding that Dwarka Singh was congenitally cripple. On the question of law, involved in the case, he disagreed with the view of the learned Munsif that Dwarka had in him vested by survivorship any right in the family properties in spite of physical disability. The plaintiff, therefore, has come up in second appeal, and the learned Counsel, Mr. Rajkishore Prasad, appearing in support of the appeal, strenuously contends that congenital lameness is not a disqualification according to Manu, and even if it be taken to be a disqualification, it does not disqualify a coparcener of a joint Hindu Mitakshara family from acquiring a right in property by right of survivorship. The disqualification defeats the right of inheritance only. I am afraid I cannot accept this contention as sound. The authorities relied upon by him do not make good this point. The case in 13 Pat. 712¹ is one of the cases very much relied upon by him. I, therefore, intend to deal with this case in somewhat detail. What happened in this case, was that the common ancestor, one Ghasi Ram, had two sons Motiram and Ratiram. Motiram was the great great grand-father of Ram Sundar and Janardan. Ram Sundar was the son of Raghunath by his first wife Deokikuar, and Janardan, the son of Raghunath by his second wife Dilraj Kuer. The third defendant in the action was the Manager of the Court of Wards who had been the Manager of the estate for many years since the time when Raghunath the father became insane. The plaintiffs of that case were the great great grand-sons of Ratiram who was the second son of the common ancestor Ghasiram. The plaintiffs claimed the estate known as the Loro estate as the nearest heirs of the last male holder, who, according to them, was Ram Sundar. The defence case was that

Ram Sundar was insane at the death of Raghunath and died in that condition, and that the estate never vested in him but in Janardan, his step brother. Janardan, who predeceased Ram Sundar left his widow and mother Mt. Dilraj Kuari as his heirs. In the circumstances Dilraj Kuari was the rightful owner. The case that Ram Sundar was a congenital idiot or insane was not found true. The parties were content to argue their case on two alternative hypotheses, namely, that Ram Sundar was either insane at the death of Raghunath, his father, or at the time of the death of Janardan, his step brother. Reliance was placed on behalf of the defendant on Colebrook's translation of Mitakshara, Chap. II, S. 10, placitum 6 which is as follows :

[7] "They (referring to disqualified persons mentioned in placitum 2. impotent persons, an outcast, etc., a man affected by any of the various sorts of insanity) are debarred of their shares if their disqualification arose before the division of the property. But one already separated from his co-heirs he is not deprived of his allotment."

[8] Basing on this, what was contended, relying on 10 All. 272² at p. 286, was that the right of property in the joint family estate under the Mitakshara is so connected *with the right to partition that it did not exist* where there was no right to partition; and that as the disqualification resulted in excluding him from right to partition under placitum 6, it necessarily involved a complete ouster from coparcenary, that thus Ram Sundar having no right of coparcenary nothing would go to the plaintiffs as his reversioners. As a further alternative it was argued that Ram Sundar being insane at the death of his father, the property vested in Janardan and on Janardan's death the property went to his widow and thereafter to his mother, Mt. Dilraj Kuari, the defendant. In answer to this argument of the defendant, it was contended by the plaintiff that Ram Sundar not being disqualified at his birth, an interest in the estate vested in him, and although insanity supervened and Ram Sundar was disqualified from taking a portion on partition, had there been one, that vested right was in abeyance but his rights as a coparcener were not otherwise affected. In support of this proposition, placitum 7 of the same Chapter and section was relied upon which provides:

[9] "If the defect be removed by medicaments or other means (as penance and atonement) at a period subsequent to partition, the right of participation takes effect by analogy (to the case of a son born after separation) when the sons have been

1. ('34) 21 A. I. R. 1934 Pat. 373; 13 Pat. 712; 151 I. C. 419, Mt. Dilraj Kuer v. Riksheshwar Ram Dube.

2. ('88) 10 All. 272; 15 I. A. 51; 5 Sar. 139 (P. C.), Sartaj Kuari v. Deoraj Kuari.

separated one who is afterwards born of a woman equal in class shares the distribution."

[10] Reliance was also sought to be placed upon the text of Manu, as it has been done here before us, but his Lordship Wort, J. observed:

[11] "We are, however, to ascertain the position from the Mitakshara, the school to which the parties belong and in any event the view contended for adds nothing in my judgment to the case."

[12] His Lordship further observed :

[13] "The text of Mitakshara is silent as to whether the disqualified person loses his right as a coparcener or merely his right to partition"

[14] In the result the appeal was disposed of in terms of the following observations:

[15] "In my judgment there is nothing in the Mitakshara which would entitle us to hold that on the death of the other co-sharer Janardan, Ram Sundar would not take the estate as the sole surviving member of the coparcenary and the view taken in the Madras High Court is the correct one, the case in 43 Mad. 464³ being correctly decided".

[16] It is urged that in view of this decision, Bansi and his son Dwarka being the only two members of their separated family on Bansi's death, Dwarka, as the sole surviving member of the co-parcenary, would get the property and would be competent to convey an interest therein by his sale. The learned Munsif in his conclusion referred to above, also relied upon this. This argument, however, overlooked the fact that in the case cited, Ram Sundar was held not to be congenitally insane, and as it has been made clear by his Lordship Dhavle J., in his concurring judgment that he having become a co-parcener by birth his right by his subsequent disqualification came to be only in abeyance to the extent of preventing his enforcing a right to partition, and therefore on his death, his next reversioner could succeed to the right which *was in abeyance* but not lost nor *divested*. The case, therefore, is distinguishable from the facts of the present case. The only other case that was cited by the learned Counsel, namely, the case in 43 Mad. 464³ is the one which has also been referred to in the Patna case by Wort J., and does not at all improve the appellant's case. The fact remains, however, as observed by Wort J., that the text of Mitakshara is silent as to whether the disqualified person loses his right as a co-parcener or merely his right to partition. The only text of Mitakshara which deals with disqualification is the one already quoted and properly analysed the text amounts to say that disqualification, congenital or otherwise, debars the disqualified person from getting a share on partition. The

position whether one who is disqualified at birth does not become even a coparcener of a Mitakshara joint family in all its implications is still a matter of doubt, and has not as yet been decided in any decided case. It is clear, however, that when a congenitally or otherwise disqualified person continues to live in the joint family and a son is born of him, the latter gets a share on partition which his father could have got had he not been disqualified. This conflicts with the theory that congenitally disqualified person is not a coparcener for any purposes whatsoever. Maxmuller's Sacred Book of the East, vol. XXV, pp. 372-373, paras. 201 and 203. The latter paragraph reads:

[17] "If the eunuch and the rest (referring to disqualified heirs enumerated in para. 201) should somehow or other desire to take wives, the offspring of such among them as have children is worthy of a share".

[18] J. C. Ghosh on Hindu law, Vol I, p. 208 says:

[19] "According to the law-givers, these unfortunate persons (referring to the disqualified) do not cease to be members of the family, and are entitled with their wives and children to be maintained out of the family property The sons of these disqualified persons, if free from any defect entailing exclusion, are entitled to take that share of the family property, which their fathers would have taken if not disqualified. Even their Kshetrāja sons (sons by appointment) are entitled to take their shares."

[20] The same learned author after discussing the text says that they are entitled to resume their shares if cured of the deformities. At p. 209 of the same volume, the author referring to Saraswati-Vilasa says:

[21] "The Saraswati-Vilasa says in this connection, 'the inner meaning is that deformed persons, if they are eligible for marriage, are sharetakers'. Therefore, the proper way to determine, whether a person is excluded from inheritance, is to ascertain whether he is debarred from marrying."

[22.] In Mitakshara, S. X in which the Rules relating to exclusion of disqualified persons occur is entitled "On exclusion from inheritance". The specific rules that deal with disqualification, so far as they are relevant to the present enquiry, are Rr. 1, 2, 5, 6, 7, 9 and 10. Rule 1 — "An important person, . . . one lame etc. must be maintained; excluding them, however, from participation". Rule 2 defines "lame" as "deprived of the use of his feet". This Rule inevitably covers the case before us as the evidence is that Dwarka moves like a quadruped. Rule 5 enjoins that these disqualified persons who are excluded from participation must be maintained. Rule 7 rules that if the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect.

3. (20) 7 A. I. R. 1920 Mad. 652 : 43 Mad. 464 : 55 I. C. 576, Muthusami Gurukhal v. Meenammal.

Rule 6 provides that exclusion takes place only if the disqualification occurs before division but one already separated from his co-heirs is not deprived of his allotment. This Rule settles that right once vested cannot be divested. Rule 9 provides :

[23] "The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds: 'But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects'."

[24] Rule 10 speaks of the sons as rightful partakers. The subsequent rules in the section entitled the wives and the daughters of disqualified persons to be maintained and the latter to be given in marriage out of the joint family funds. The net result of these texts and authorities appears to be that rights once vested cannot be divested. They (i. e. disqualified members) have no right to partition but have certain other rights of a coparcener, such as right to be maintained with their wives and children and to be stock of descent so as to transmit their shares to their legitimate sons and sons of their wives through Niyogi (appointment). In the decided case of this court, above referred to, Ram-sundar though disqualified to participate in the share was held a stock of descent of the inheritance for his own heirs in preference to the heirs of his predeceased step-brother. There is neither any decided case, nor anything in the texts above adverted to, to establish that a congenitally disqualified person is excluded from being a coparcener.

[25] Mr. Rajkishore Prasad wants to argue that it follows as a corollary from 13 Pat. 712¹ that right to take a share is there in the disqualified person, but it is only in abeyance and that if it can descend to his heirs on his death, it can as well be conveyed by sale. But every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of expression that may be found are not intended to be expositions of whole law but governed or qualified by the particular facts of the case in which such expressions are found; that is, a case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow from it logically. The decision in 13 Pat. 712¹ is no authority for the proposition that a right that can descend in law to a disqualified one's heir or successor can be conveyed by him to a stranger by transaction *inter vivos* nor is it a precedent for vesting of coparcenary right in a congenitally disqualified person because it is a precedent

only for the proposition that a supervening disqualification cannot take away a right already vested. The larger problem whether Dwarka, disqualified as he was at his birth, was not excluded from coparcenership with his father or the defendants 1 to 11 so as to be entitled to continue in possession of the family property till his death, is not before us. Without finally deciding the question, I am inclined to the view based upon the original text referred to above that he is a coparcener for certain purposes with rights to descend to his natural heirs present or to come into being on his taking a married life, if he so chooses. I shall not be understood, for the decision in this case I am coming to, to say that Dwarka is not entitled to possession of the property belonging to the coparcenary constituted by himself and his father Bansi or the defendants 1 to 11 or their ancestors as the case may be. But the limited question before us is if Dwarka under the circumstances of the case is entitled to partition of his share in the family property and separately possess it and whether he can, by any transaction *inter vivos*, convey such a right to his assignee. From what has been discussed above, it is clear to my mind that this question must be answered in the negative. Dwarka, far less the plaintiff, his transferee, has no right to partition and separate possession. The plaintiff's suit, therefore, has been rightly dismissed by the learned lower appellate Court. The appeal fails and is, therefore, dismissed with costs.

[26] **Fazl Ali, C. J.** — I agree.

D.R./D.H.

Appeal dismissed.

A. I. R. (33) 1946 Patna 423 [C. N. 143]
IMAM J.

Jaisri Sahu and another — Appellants.
v. Doma and others — Respondents.

Appeal No. 861 of 1944, Decided on 24th January 1946, from appellate decree of Sub-Judge, Ranchi, D/-6th May 1944.

Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 46 (4) (a)—Applicability—Suit for possession — Lands within local limits of Police Station M — Plaintiff and sale deed in plaintiffs' favour stating that plaintiffs were residents of village within M — One defendant stating in written statement that sale was paper transaction as vendor belonged to different area — Lower Court treating word 'Vendor' as mis-type for 'Vendee' — No other defendant giving slightest indication that plaintiffs were not residents of village within M — No issue framed on this point — Defendant's statement held gave no due notice to plaintiffs of plea that they were not resi-

dents within *M*—Plaintiffs' evidence that they were not residents within *M* having remained un rebutted, section held had no application to case.

In a suit for possession of certain lands, the plaint distinctly stated that the plaintiffs were residents of a village within the local limits of police station *M* within which the lands were situate. The sale deed by which the plaintiffs acquired the lands also distinctly described the vendees as residents of that village. One of the several defendants to the suit stated in his written statement that the sale had all been a paper transaction conferring no title or possession of the land since the *vendor* belonged to a different area. Except this defendant not a single defendant indicated in the slightest way that the plaintiffs were not residents of the village. No issue was framed as to whether the plaintiffs at the time that the document was executed were residents within the local limits of police station *M*. The lower appellate Court was of opinion that the word "*vendor*" in the written statement was a mis-type for "*Vendee*" and, therefore, there was an assertion in the written statement that the plaintiffs belonged to a different area. Both the Lower Courts held that plaintiffs were not the residents within the local limits of police station *M* :

Held [1] that the Courts below were not at all justified in taking the defendant's statement into consideration and thereby attributing to the plaintiffs due notice of a plea that they were not residents within the jurisdiction of Police Station *M*.

[P 425 C 2]

[2] That as the Courts below had defeated the rightful claim of the plaintiffs by a procedure which was wholly irregular and reasonings which were unsound the High Court could under S. 103, C. P. C., look into the evidence and satisfy itself that there was no evidence to establish that the plaintiffs were not residents within the jurisdiction of police station *M*. [P 426 C 1]

[3] That the plaintiffs' evidence that they were residents of the village within the jurisdiction of police station *M* remained un rebutted and therefore, S. 46 (4) (a) had no application to the case. [P 426 C 1]

A. N. Lal and L. K. Chaudhuri—for Appellants.

R. K. Sinha and Satyanand Kumar —

for Respondents.

Judgment.— This is an appeal by the plaintiffs. They sued for recovery of possession of the lands in suit which were recorded in the revisional settlement under *khata* Nos. 70 and 71 in the name of one Harakhman Sahu. On 11th February 1936, Harakhman Sahu sold these lands to one Alam Sahu under a registered sale deed. Alam Sahu subsequently in the year 1941, sold to the plaintiffs under a registered deed dated 17th April 1941, the lands in suit. The plaintiffs after their purchase from Alam Sahu attempted to take possession of the lands, but were resisted by the defendants. Both the courts below rejected the defence case and came to the definite conclusion that Alam Sahu was not the *farzidar* of Harakhman Sahu and that the sale to the former was for consideration, valid and

a genuine transaction. Both the Courts also held that under the document Alam Sahu acquired a valid title and the alleged settlements made in favour of the defendants by Harakhman Sahu after he had transferred his interest in the lands were of no help to the defendants. It would also appear from the judgments of the courts below that Harakhman Sahu was an unscrupulous man; but the courts below were of the opinion that the plaintiffs' suit must be dismissed on the ground that S. 46 (4) (a), Chota Nagpur Tenancy Act, stood in the way. The section states that :

[2] "An occupancy-raiyat, who is not an aboriginal or a member of a scheduled caste, may transfer his right in his holding or any portion thereof to any person who is resident within the local limits of the police-station area within which the holding is situate by sale, exchange, gift, will, mortgage or lease".

[3] The Munsif came to the conclusion that the plaintiffs were not residents of village Malti where the lands in suit were situate and, therefore, the purchase by the plaintiffs was illegal and inoperative. The lower appellate Court came to the conclusion that the story of the plaintiffs' having purchased a house in Mauzah Malti was a myth and that the plaintiffs were not residents of village Malti or of any other village within the local limits of police station Mander (the *thana* within which the lands in suit lie).

[4] It was urged on behalf of the appellants that before one could apply S. 46 (4) (a), Chota Nagpur Tenancy Act, it had to be found as a fact that the plaintiffs were not residents within the local limits of the Police station area within which the lands in suit were situate. No issue had been framed on this point as to whether the plaintiffs at the time that the document was executed in their favour in 1941 by Alam Sahu were residents within the local limits of police station Mander and it is argued that the plaintiffs were prejudiced by having to meet all of a sudden the contention that they were not residents within the local limits of police station Mander. It was pointed out that although the document by which the plaintiffs acquired the lands from Alam Sahu distinctly describes the vendees as residents of Malti and the plaint distinctly states that the plaintiffs were residents of Malti, a village within the jurisdiction of police station Mander, there was nothing in the various written statements filed on behalf of the defendants in which there was the slightest indication by which the plaintiffs could understand that any of the numerous defen-

dants were challenging the fact that the plaintiffs were residents of any place, village or area within the local limits of police station Mander.

[5] The learned Subordinate Judge seemed to think that although no issue was framed, but if the parties adduced evidence on the point and discussed it before the trial Court and a decision was given on it as if there was an issue framed on it, the decision would not be set aside in appeal on the ground merely that no issue had been framed. The question which seriously arises in this case is whether the parties in fact led any evidence on the point as to whether the plaintiffs were residents of any village, place or area within the local limits of police station Mander. The learned Subordinate Judge thought that paragraph 5 of the written statement of defendant No. 1 indicated that there was a plea to the effect that the plaintiffs were not residents within the jurisdiction of police station Mander. Several written statements were filed in the case and I have been through every one of them. Not a single defendant, barring defendant No. 1, has indicated in the slightest way that the plaintiffs were not residents of village Malti or of any place within the jurisdiction of police station Mander. This paragraph 5 of the written statement of defendant No. 1 reads as follows :

[6] "That the allegations in paragraph III are manufactured. Even if sale has been held, it is farzi, collusive and without consideration and it has all been paper transaction conferring no title or possession of the land since the vendor belongs to a different area".

[7] This paragraph appears to have been corrected by the pleader who has initialled every correction that he has made in the written statement but did not alter the word "vendor" into "vendee". The learned Subordinate Judge is of the opinion that the word 'vendor' was a mis-type for 'vendee' and, therefore, there was an assertion in at least one of the written statements that the plaintiffs belonged to a different area. It has to be remembered that the case of the defendants throughout was that Alam Sahu was never in possession of the lands and that the transaction between him and the plaintiffs was collusive, fraudulent, without consideration and a *farzi* transaction. If defendant 1 in denying the allegations of the plaintiffs in para. 3 of the plaint reiterated his claim that the whole transaction was a mere paper transaction between Alam Shah and the plaintiffs, I would not be surprised if any one reading this paragraph in the written statement

would think that the assertion further was that the entire transaction was a paper transaction because the vendor Alam Sahu lived in another place. I do not think that the courts below were at all justified in taking this paragraph into consideration and thereby attributing to the plaintiffs due notice of a plea by one of the defendants that they were not residents within the jurisdiction of police station Mander.

[8] On a further point, I am of opinion that the courts below have misdirected themselves, namely, that the parties knew what they were about and evidence was being led with reference to it. I have read the entire oral evidence in this case and I find that none of the plaintiffs' witnesses spoke one word in their examination-in-chief on the question as to whether the plaintiffs were residents within the jurisdiction of police station Mander. It was only in cross-examination that questions were put by the defence to the effect as to whether the plaintiffs had a house or lands in village Malti. There was to these questions the answer in the affirmative and the lower appellate Court seemed to reject this evidence on the ground that there was no documentary evidence in proof of it. It seems to me somewhat extraordinary that when witnesses are taken by surprise and asked certain questions in cross-examination and the answers are to the detriment of the defendants that the witnesses should be disbelieved on the ground that they have got no documentary evidence in support of their evidence. This clearly indicates, to my mind, that the plaintiff never thought for a moment that he had to lead evidence on the question as to whether he was a resident within the jurisdiction of police station Mander.

[9] This is the state of the evidence so far as the plaintiffs are concerned and as to whether the defendants ever thought that they were leading evidence on the point it is remarkable by the complete absence of any statement on the part of their witnesses that the plaintiffs were not residents within the jurisdiction of Police station Mander. Of all the witnesses for the defence only one has come forward to say that the plaintiffs have no house in Malti which, in my opinion, is wholly irrelevant and does not decide the matter as to whether the plaintiffs are or are not residents within the jurisdiction of police station Mander. None of the witnesses for the plaintiffs were challenged on the point, apart from the question of ownership of the

land, as to whether any of them were residents within the jurisdiction of police-station Mander. I am quite satisfied on the state of the record that none of the parties ever understood that they were leading evidence on a point material to the decision of the case, namely, as to whether the plaintiffs were residents within the jurisdiction of police station Mander.

[10] I have gone into great length in this matter because I have felt that both the courts have defeated the rightful claim of the plaintiffs by a procedure which is wholly irregular and reasonings which are unsound and I have, therefore, looked into the evidence under section 103 of the Code of Civil Procedure for myself and I am quite satisfied that there is no evidence in the case at all on either side to establish that the plaintiffs were not residents within the jurisdiction of police station Mander. My attention was also drawn to certain authorities to show that by the expression 'resident' the section did not contemplate that the individual must be a permanent resident. There was abundance of evidence on the side of the plaintiffs of their possessing a house and lands not only in village Malti but other villages within the jurisdiction of Police station Mander. I would therefore hold that the plaintiffs' evidence that they are residents of village Malti within the jurisdiction of Police station Mander remained un rebutted and therefore S. 46, (4) (a) of the Chota Nagpur Tenancy Act has no application to the case. The appeal must accordingly be allowed and the plaintiffs' suit must be decreed with costs throughout.

V.R./D.H.

*Appeal allowed.***A. I. R. (33) 1946 Patna 426 [C. N. 144]**

DAS AND PANDE JJ.

Baldeo Mahato—Appellant v. Emperor.

Criminal Appeal No. 523 of 1945, Decided on 11th December 1945 from order of Asst. Sessions Judge, Bhagalpur D/- 30th June 1945.

(a) Criminal P. C. (1898), S. 297 — Non-direction — Offence under S. 376, Penal Code — Failure of judge to warn jury that it is unsafe to rely on uncorroborated testimony of girl amounts to serious non-direction vitiating trial.

In a trial for offence under S. 376, Penal Code, it is the duty of the judge to point out in the clearest language that it is extremely dangerous to base a conviction upon the girl's evidence and he should stress the fact that before the jury can properly return a verdict of guilty, they must be satisfied that the girl's evidence is corroborated by other independent testimony. Having given such a warning, the judge should explain to the jury what amounts to corroboration. He should then point out to the jury what evidence can legally amount to corroboration and he should ask the jury to

consider whether or not they accept such evidence. Finally, he should tell the jury that they should only convict if they are satisfied that the evidence tendered as corroboration is true and worthy of credence. Consequently the failure of the judge to warn the jury in such a case that it is unsafe to convict the accused on the uncorroborated testimony of the girl amounts to a serious misdirection which vitiates the trial. ('39) 26 A.I.R. 1939 Pat. 536, ('34) 21 A.I.R. 1934 Cal. 7 and ('36) 23 A.I.R. 1936 Cal. 18 *Rel. on*; ('38) 25 A.I.R. 1938 Cal. 658 *disting.* [P 427 C 1, 2]

Criminal P. C. —

('46) Chitale, S. 297, N. 12, pt. 27.

('41) Mitra, S. 297, p. 1018, para. 915.

[b] Criminal P. C. (1898), S. 297 — Mis-direction—Offence under S. 376, Penal Code—Charge to jury — Judge referring to statements made by girl as corroborative evidence commits misdirection.

Though the nature of corroboration required in a criminal case must necessarily vary according to the particular circumstances of the offence charged, the corroborative evidence must be of such a character as would tend directly or indirectly to connect the accused with the crime and should come from an independent source. In a trial for an offence under S. 376, Penal Code the statements made by the girl to other witnesses after the commission of the crime would not be corroborative evidence of her story, and consequently if the Judge in his charge to the jury refers to such statements as corroborative evidence he commits a serious misdirection. [P 428 C 1,2]

Criminal P. C. —

('46) Chitale, S. 297, N. 11, pt. 32.

('41) Mitra, S. 297, p. 1040, para. 917.

(c) Criminal P. C. (1898), S. 297—Nondirection — Offence under S. 375, Penal Code—Question of consent of girl with reference to her age should be explained—Failure amounts to non-direction.

In a trial for offence under S. 375, Penal Code the judge should explain properly to the jury the ingredients of the offence charged and the question of consent with reference to the age of the girl upon whom the offence is committed even though the girl might be under 14 years and the question of her consent would be immaterial. Similarly the judge should also state under which of the circumstances mentioned in S. 375 the case would fall and should not leave it to the jury to decide it. The failure of the judge to do so amounts to a defect in the charge. [P 428 C 1,2]

Criminal P. C. —

('46) Chitale, S. 297, N. 9 and 12.

Mangleshwar Prasad Sinha — for Appellant.*Raj Kishore Prasad* — for the Crown.

Das J. — This is an appeal from jail in which Mr. Mangleshwar Prasad Sinha has very kindly assisted us. The appellant Baldeo Mahato has been found guilty of the offence under S. 376, Penal Code, by the learned Assistant Sessions Judge of Bhagalpur in agreement with the unanimous verdict of the jury, and has been sentenced to rigorous imprisonment for seven years.

[2] The allegation against the appellant was that in the afternoon of 24th December 1944, he had committed rape on a girl called Mt. Lachhia, aged about 13, at a place called Manelia jungle. It was alleged by the

prosecution that both the appellant and the girl Mt. Lachhia had gone to the said jungle to tend cattle. The appellant suddenly lifted Mt. Lachhia in his lap and took her to a ditch nearby. He placed her on the ground, removed her *Sari* and then committed rape on her. Mt. Lachhia tried to cry out, but her mouth was gagged. When the appellant left the girl, she found that she was bleeding from the vagina. She got up and painfully returned to her house, where she narrated to her mother what happened. The mother then took the girl to the house of the appellant's step-father where, in the presence of certain other persons, the girl is stated to have narrated her story. It was alleged by the prosecution that the mother of the girl removed the blood stained *Sari* and gave the girl another *Sari* to wear. The blood stained sari was then washed by the mother. The next morning the girl and her mother went to one Pathal Rai whose cattle the girl used to tend. On the advice of Pathal Rai, information was lodged at the police station. On that information an investigation was made, and the appellant was put on trial with the result stated above. The defence of the appellant was that he had been falsely implicated, because his step-father had given him some land which had caused annoyance to the mother of one Ritwa. Ritwa, it was alleged, was the brother of the girl Mt. Lachhia.

[3] Mr. Mangleshwar Prasad Sinha, appearing on behalf of the appellant has placed before us the charge to the jury, and he has complained of a serious non-direction by the learned Assistant Sessions Judge and also of a misdirection regarding the nature of the evidence given in the case. The non-direction of which he has complained consists of the failure to give to the jury the usual caution that it is unsafe to rely on the uncorroborated evidence of the prosecutrix in cases of this nature. The learned Assistant Sessions Judge has several times reminded the jury that the solitary eye-witness of the occurrence is the victim herself, namely Mt. Lachhia, but nowhere has he told the jury that in cases of this nature it is unsafe to rely on the uncorroborated testimony of the prosecutrix. The duty of the judge in such a case has been very clearly laid down by this Court in *Sachinder Rai v. Emperor*,¹ where Harries, C. J. has observed as follows :

[4] "In my view, in cases of this kind the learned Judge must point out in the clearest language that it is extremely dangerous to base a conviction upon the girl's evidence and he should stress the fact

1. ('39) 26 A.I.R. 1939 Pat. 536 : 18 Pat. 698 : 184 I. C. 354.

that before the jury can properly return a verdict of guilty, they must be satisfied that the girl's evidence is corroborated by other independent testimony. Having given such a warning, the learned Judge should explain to the jury what amounts to corroboration. He should then point out to the jury what evidence can legally amount to corroboration and he should ask the jury to consider whether or not they accept such evidence. Finally, he should tell the jury that they should only convict if they are satisfied that the evidence tendered as corroboration is true and worthy of credence".

[5] Reference has been made in that case to many earlier decisions where also the same point has been discussed, and it has been laid down that a warning about the danger of convicting a person in such cases upon the evidence of the woman alone is absolutely necessary and must be emphatic, and in its absence, the conviction is vitiated, *vide* A. I. R. 1934 Cal. 7² and A. I. R. 1936 Cal. 18.³ In the case under our consideration, the learned Assistant Sessions Judge has nowhere given the necessary warning to the jury. On the contrary, he has left the jury to convict the appellant on the solitary testimony of the girl. It is clear that in doing so, the learned Assistant Sessions Judge has committed a very serious non direction which vitiates the trial. There is, indeed, one case in I. L. R. (1938) 1 Cal. 636,⁴ where it has been stated that the absence of the usual caution given to the jury in sexual cases to the effect that it is unsafe to rely on the uncorroborated evidence of the prosecutrix does not necessarily vitiate the verdict; the effect of such omission depends upon the facts of each case. These observations were made in a case in which the evidence of the girl was corroborated independently by very strong evidence and the learned Judge had placed the entire evidence in the case fairly and impartially to the jury. I shall presently discuss the question as to whether there is any such corroborative evidence in this case as is required in cases of this nature. It is sufficient to state here that this was not a case in which there was very strong corroborative evidence in support of the story given by the girl. It was, therefore, all the more necessary for the learned Judge to give the usual caution to the jury that in cases of this nature it is unsafe to rely on the uncorroborated testimony of the girl.

[6] As to the mis-direction, Mr. Sinha appearing for the appellant has drawn our

2. ('34) 21 A. I. R. 1934 Cal. 7 : 62 Cal. 527 : 155 I. C. 584, *Emperor v. Nur Ahmed*.

3. ('36) 23 A. I. R. 1936 Cal. 18 : 160 I. C. 1028, *Chamuddin Sardar v. Emperor*.

4. ('38) 25 A.I.R. 1938 Cal. 658 : I. L. R. (1938) 1 Cal. 636 : 178 I.C. 637, *Abdul Gafur v. Emperor*.

attention to the fact that the learned judge has treated the girl's own statements to other witnesses as corroborative evidence. Here also the learned Judge was in error. The nature of the corroborative evidence required in such cases has been explained very fully and clearly in the leading case in the (1916) 2. K. B. 658⁵. The learned Lord Chief Justice had observed therein that:

[7] "The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it".

[8] It has further been observed that:

[9] "The nature of the corroboration must necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

[10] Referring to the statements of the girl herself in such cases, it has been observed by the learned Lord Chief Justice, Lord Hewart in (1928) 21 Cr. App. R. 23,⁶ that "corroboration should come from another person altogether". In 62 Cal. 527² it has been observed that what the prosecutrix says to other person is not corroborative evidence within the meaning of the rule referred to above. The learned Assistant Sessions Judge has, however, referred to the statements of the girl herself made to other witnesses as affording corroboration of her story. In this respect the learned Judge has committed a serious mis-direction.

[11] Apart from the two defects mentioned above, the learned Judge has not properly explained to the jury the ingredients which are necessary for an offence under S. 375, Penal Code. Section 375, Penal code, which defines the offence of rape mentions the various circumstances under which sexual intercourse with a woman will amount to the offence of rape. The learned Assistant Sessions Judge has merely told the jury that any of those five circumstances in which sexual intercourse may be committed will constitute the offence of rape, without telling the jury what is the particular circumstance under which the present case comes. The allegation was that the appellant had

committed rape on a girl aged about 13. If the age of the girl was below 14, then the question of her consent would be immaterial, still the question of consent with reference to the age of the girl should have been explained to the jury. The learned Assistant Sessions Judge does not appear to have focussed the attention of the jury on this point. He left the jury to find out under which of the several circumstances enumerated in section 375 the offence would come. This, however, would not have been a very material defect, if the learned Assistant Sessions Judge had given the usual caution to the jury and had explained to them the nature of the corroboration which is required in cases of this nature.

[12] I am therefore of the view that the verdict of the jury in this case is vitiated by very serious non-direction and misdirection. The next question which arises for consideration is whether the case should go back for a re-trial or not. Learned counsel for the Crown has placed the evidence before us and has conceded with great fairness that there is no direct corroboration of the evidence of the girl with regard to the complicity of the appellant. There is no doubt corroboration of the fact that somebody had sexual intercourse with the girl; it may even be that the sexual intercourse was either with or without her consent. The medical evidence in the case disclosed that the hymen had been ruptured. It further disclosed discharge of blood from the vagina in which red blood corpuscles were present. The doctor further said that the vagina was inflamed and tender to the touch. These facts would no doubt corroborate the story of the girl to the effect that she had been subjected to sexual intercourse; but as stated above, the corroborative evidence must be of such a character as would tend directly or indirectly to connect the accused with the crime. Such corroborative evidence is absent in this case. The girl no doubt had stated to different persons that she had been raped by the appellant. I have observed above that the statements of the girl herself, subsequently made to other persons cannot be said to be corroborative evidence of the nature required in such cases. There being no corroborative evidence in support of the story of the girl, it would not serve any useful purpose to send the case back for re-trial. For the reasons given above, I would allow this appeal, set aside the conviction and sentence passed against the appellant and acquit him. The appellant should forthwith be released from custody.

[13] **Pande J.**—I agree.

K.S.

Conviction set aside.

5. (1916) 2 K. B. 658: 86 L. J. K. B. 28: 115 L. T. 453, *King v. Baskerville*.

6. (1928) 21 Cr. App. R. 23 : 139 L. T. 640, *Rex v. Job Whitehead*.

A. I. R. (33) 1946 Patna 429 [C. N. 145]

SINHA J.

Thakur Mahto and others — Petitioners v. Jago Kuer and another—Opposite Party.

Civil Revn. No. 77 of 1945, Decided on 6th December 1945, from order of Sub-Judge Patna, D/- 13th November 1944.

(a) Civil P. C. (1908), S. 11 — First application for amendment dismissed without hearing — Second application on same allegations is not barred by *res judicata*.

Where a plaintiff made an application for amendment of plaint and it was dismissed without hearing parties on the ground that the application was not moved and the plaintiff again made a second application with the same allegations:

Held that as the first application was dismissed without hearing the parties, the principle of *res judicata* did not apply and the second application was not barred. [P 429 C 2]

Civil P. C. —

('44) Chitaley, S. 11, N. 22.

('41) Mulla, p. 91.

(b) Civil P. C. (1908), O. 6, R. 17—Amendment — Suit by reversioner to set aside mortgage against widow and mortgagees—After receipt of summons widow selling property to several vendees—Amendment allowing vendees to be joined as parties held, should be allowed.

Ordinarily events coming into existence after the institution of the original suit are not taken into account but in exceptional circumstances it is open to court to allow the parties to go into matters which came into existence after the institution of the suit. [P 430 C 1]

Plaintiff, a reversioner brought a suit to set aside a mortgage executed by a widow against the widow and her mortgagees. Subsequent to the receipt of summonses the widow conveyed the property to several vendees and the plaintiff applied for amendment of plaint by adding the allegations that the sale-deeds had been brought into existence by the vendees in conspiracy with the original defendants and asking for leave to add the vendees as defendants. The amendment was allowed and defendants applied in revision :

Held that if the sales had taken place before the institution of the suit the plaintiff could have joined all the defendants under O. 1, R. 3. The effect of allowing the amendment was not to change the nature of the suit or to substitute one cause of action for another. The only effect of allowing the amendment was to allow the plaintiff to add certain more causes of action to the original one. The most important principle governing amendment of plaint was that amendments should be allowed if by doing so multiplicity of suits might be avoided. On the allegations of the plaintiff all these causes of action were allied to one another and the amendment had the effect of avoiding multiplicity of suits. The order allowing amendment was, therefore, proper. [P 430 C 1]

Civil P. C. —

('44) Chitaley, O. 6, R. 17, N. 11, pt. 2.

C. P. Sinha—for Petitioners.

Rajkishore Prasad—for Opposite Party.

Order.—This application in revision is directed against the order of the learned Subordinate Judge, Second Court of Patna, dated 13th November 1944, allowing amendment of the

plaint by adding some more defendants and by adding also some causes of action arising subsequent to the suit.

[2] It appears that the plaintiffs instituted the suit originally for setting aside a mortgage bond dated 18th July 1939, said to have been executed by the defendant 1 in favour of defendants 2 to 5. The suit was instituted on 2nd February 1944, and summonses were served on 2nd April 1944. Written statement was filed on 14th July 1944. In between the service of summonses and the filing of the written statement, on 8th April 1944, the defendant 1 executed five sale deeds in favour of the defendants sought to be added by the amendment on the allegations that the defendants amongst themselves had conspired to bring into existence subsequent sale deeds, and therefore leave was prayed for and obtained from the Court for adding these allegations to the plaint and making the vendees parties to the suit. The application for amendment was made on 5th August 1944, which was rejected without hearing the parties on the ground that the said application had not been moved. The plaintiffs made the same application again on 6th November 1944, which was heard in presence of the parties on 13th November, and the Court ordered that the amendment should be allowed on condition that the plaintiffs should pay Rs. 32 as costs to the other side. By the same order the plaintiffs were directed to get summonses served on the added defendants, and it appears further that in January 1945, before this Court was moved in February this year, the Court executed (sic-exacted) additional court-fees also from the plaintiffs in respect of the transactions which had been allowed to be added to the plaint by way of amendment. This Court was moved by the defendants, and a rule was issued by this Court on 16th February 1945 staying proceedings in the Court below.

[3] It has been strenuously argued by Mr. C. P. Sinha appearing on behalf of the petitioner that this application for amendment should not have been allowed, firstly because the same application had been dismissed on the previous occasion, that is to say, on 7th August 1944; and secondly because the amendment did not come within the purview of rules 3 and 10 of O. 1, Civil P. C.

[4] In respect to the first ground of attack, it is enough to point out that the first application had been dismissed without hearing the parties, and therefore the principle of *res judicata* would not apply to such an order. As regards the second contention, it does raise a serious question. The contention is that the

added defendants took their sale deeds long after the institution of the suit. Therefore, those transactions afforded a separate cause of action to the plaintiffs which could not be joined to the original cause of action which was comprised in the plaint as originally filed. In this connection it is necessary to state the additional fact that it is the plaintiffs' allegation that the defendants already on the record had in pursuance of a scheme brought into existence the sale deeds in question soon after summonses had been served upon them so as to make it sure that the plaintiffs did not get any effective relief in the suit as originally instituted. Ordinarily events coming into existence after the institution of the original suit are not to be taken into account, but cases have laid it down that in exceptional circumstances like the occurrence of devolution of interest by death or otherwise, it is open to the Court to allow the parties to go into matters which came into existence after the institution of the suit. If these transactions had come into existence before the institution of the suit, then, in my opinion, R. 3 of O. 1 would have applied to the facts alleged by the plaintiffs. The plaintiffs have in effect alleged that these transactions arise out of the desire of the defendant no. 1 who is a widow possessing the property for the time being to place the property out of the reach of the reversioners. The allegations further are that all these transactions, namely, the mortgage bond which was originally included in the suit and the sale deeds which have been brought into existence after the institution of the suit were fraudulent and collusive transactions without any necessity or benefit of the estate. Hence, it is manifest that common questions of law or fact or both may arise for determination in the suit. It is doubtful how far this amendment comes under R. 10 of O. 1, but the most important principle governing amendment of plaint is that amendments should be allowed if by doing so multiplicity of suits may be avoided. In this case that condition is entirely fulfilled. It cannot be said that by allowing the amendment the lower Court has allowed the nature of the suit to be changed or has allowed one cause of action to be substituted for another. The utmost that can be said against the order passed by the Court below allowing the amendment is that it has the effect of allowing the plaintiffs to add certain more causes of action to the original one. But as already indicated all these causes of action are allied to one another on the allegations made by the plaintiffs, namely, that all these transactions have been brought about as a

result of a conspiracy amongst the defendants.

[5] Another circumstance which must tell against the petitioners is that they did not move this Court at the earliest opportunity and allowed the plaintiffs to incur further expenses by way of having summonses served upon the added defendants and by having to pay additional Court-fees on the additional causes of action introduced into the suit. If the defendants were really anxious to get the matters set right by this Court, they should have moved this court with all due expedition.

[6] As a result of these considerations, I am not inclined to hold that the Court below has acted without jurisdiction or that it has acted with material irregularity in the exercise of its jurisdiction. The application is accordingly dismissed, but in the circumstances, without costs.

G.B./D.H.

Revision dismissed.

A.I.R. (33) 1946 Patna 430 [C. N. 146]

AGARWALA J.

Gopal Dass and another—Petitioners v. Abdul Jabber and another—Opposite Party.

Civil Revn No. 431 of 1944, Decided on 20th December 1945, against order of Munsif, Jamshedpur, D/- 19-4-44.

Civil P. C. (1908), S. 60—Provident fund—Contributions to provident fund to which Provident Funds Act is not applicable are not exempt from attachment except when they have been vested in trustees—Rules of provident fund providing for vesting of control and management of funds in trustee—No vesting of ownership of funds in trustee—No valid trust is created—Creditor can obtain attachment order in respect of funds standing to credit of his judgment—Debtor in such fund—Trusts Act (1882), S. 5.

Ordinarily a person's assets are liable for payment of his debts in whatever form he may keep or whenever he may keep them provided they are situate within the jurisdiction of the Court which is asked to proceed against them. This, of course, is subject to statutory exceptions examples of which are to be found in S. 60, Civil P. C. An amount standing to the credit of a judgment-debtor in a provident fund to which the Provident Funds Act, 1925, does not apply and does not come within any of the items mentioned in the proviso to S. 60 also is not exempt from attachment. Where, however, the funds are vested in a trustee the decree-holder is not entitled to obtain against the trustee an attachment order in respect of the amount standing to the credit of his judgment-debtor. [P 431 C 1]

Where under the rules of a provident fund called the Provident Fund of the Tin Plate Company of India, Ltd., only the management and control of the funds were vested in a person called the trustee, but there was no vesting of the ownership of the funds in the trustee, it was held there was no valid trust created as the rules failed to comply with the requirements of S. 5, Trusts Act. Consequently a creditor could obtain an attachment order in respect of the contribu-

tions standing to the credit of his debtor in such fund. ('42) 29 A.I.R. 1942 Sind 42 *Rel. on.*

[P 431 C 2; P 432 C 1]

Civil P. C.—('44) Chitaley, S. 60, N. 19, pt. 12.
(41) Mulla, S. 50, P. 246 Note 'Clause (k) Funds.'

B.N. Mitter and Ajit Kumar Mitter—

for Petitioners.

Dr. D. N. Mitter and Bhabanand Mukherji.
for Opposite party.

Order.—This application is by the decree-holders and arises out of an application which was made in the Court below to attach monies alleged to be standing to the credit of the judgment-debtors in a provident fund called the Provident Fund of the Tin Plate Company of India, Ltd.

[2] The Court below has refused to issue an attachment on a consideration of the rules governing the fund. The question for consideration is one that has of recent years been canvassed frequently in the Courts and appears no nearer a solution as different Courts have taken different views and necessarily the rules of each provident fund differ in some particulars from the rules of similar funds. It is a somewhat startling proposition that persons may place their money in deposit in a particular fund entering into an agreement among themselves to the effect of which is said to be that their creditors may be deprived of the right to touch those funds in order to realise dues from a contributor to the fund. Ordinarily a person's assets are liable for payment of his debts in whatever form he may keep or wherever he may keep them provided they are situate within the jurisdiction of the Court which is asked to proceed against them. This, of course, is subject to statutory prohibitions examples of which are to be found in S. 60, Civil P. C. I am not concerned with the Provident Funds Act in the present instance because this case does not come under it. So far as the provisions of S. 60 are concerned, the amount standing to the credit of the judgment-debtor in this case does not come within any of the items mentioned in the proviso to that section. A difficulty does arise in cases of this nature when contributions to a fund have been vested in trustees. In such cases it may be that the decree-holder is not entitled to obtain against the trustees an attachment order in respect of the amount standing to the credit of a contributor. But apart from the case where the funds are vested in trustees and cases where there are statutory prohibitions against the seizure or attachment of the deposits of a contributor, I cannot understand on what principle such amount is to be considered as beyond the reach of the contributor.

[3] I therefore propose only to consider in this case whether the sums standing to the credit of the judgment-debtors in this case are vested in the trustees. I have gone through the rules governing the fund in question. There is no rule vesting the funds in the trustees or stating that the funds are so vested. The only rule which is at all relevant to the question is no. 1 which states that the management of the fund and the control of its monies shall be vested in the trustees who undertake the management without remuneration. While this rule vests the management and control of the funds in persons called trustees, there is no attempt to vest the ownership of the funds in the trustees. In that respect, the rules I am dealing with, differ from the rules which were considered by my learned brother Shearer, J. in C. R. 345 of 1944 and the rules of many of the funds which have been the subject-matter of judicial decision. Language similar to that of R. 1 of the rules I am concerned with, was the subject-matter of the case which came before the Chief Court of Sind in A. I. R. 1942 Sind 47.¹ The precise language of the rule in that case was: "Management of the fund and the control of its fund shall be vested in Burma Shell Provident Fund Trust, Ltd." The learned Chief Justice observed that the rule did not say that the ownership of the monies vested in the trustees, and he referred to S. 5 of the Trusts Act which provides that no trust in relation to movable properties is valid unless the ownership of the property is transferred to the trustees. In my opinion, the rules with which I am dealing fail to comply with the requirements of S. 5 of the Trusts Act in so far as they have omitted to vest the monies of the fund in the trustees. To adopt the language used in that case the result of this conclusion is that the parties cannot by an agreement among themselves alter their personal law or statute law such as the Civil Procedure Code. To take any other view would, in my opinion, lead to the conclusion that it is open to persons merely by an agreement among themselves, to place their assets beyond the reach of their creditors in spite of the statute law on the subject. It follows that the order of the Court below must be set aside and an attachment must issue to the holders of this fund requiring them to retain in their hands so much of the contributions, if any, standing to the credit of the judg

1. ('42) 29 A.I.R. 1942 Sind 47 : I.L.R. (1941) Kar. 401 : 199 I.C. 525, *Ismail Jakria v. Burma Shell Provident Trust Ltd.*

ment-debtors as the Court may direct. The petitioners are entitled to their costs, hearing fee two gold mohurs.

K.S./D.H.

Revision allowed.

A. I. R. (33) 1946 Patna 432 [C. N. 147]
AGARWALA J.

Nagwant Sahay and others—Petitioners v. D. W. Ife and others—Opposite Party.

Criminal Revn. No. 920 of 1945, Decided on 9th January 1946, from order of Judicial Commissioner, Chota Nagpur, D/-3rd May 1945.

(a) Criminal P. C. (1898), S. 197—Official duty—Chastising accused is no part of duty of Deputy Commissioner or Police Officer—Students suspected of taking part in fracas—Superintendent of police caning students after consultation with Deputy Commissioner—Students lodging complaints against them under S. 323, Penal Code—Accused held did not act in discharge of their duty.

It is no part of the duty of a Deputy Commissioner, or of an officer of the police force, to chastise persons who have committed offences, even though it may be admitted by the persons accused of committing the offence that they have in fact committed it. Their duty is to apprehend the offenders and to produce them before a Court, and it is the duty of the Court alone to decide whether the alleged offence has been committed and what punishment should be inflicted on the offenders.

[P 434 C 2]

Where certain students who were suspected to have taken part in a fracas, were taken to the bungalow of the Deputy Commissioner and were caned there by the Superintendent of Police after consultation with the Deputy Commissioner and the complainants lodged complaints against them under S. 323, Penal Code, before a Magistrate who dismissed them on the ground that sanction for the prosecution of the accused had not been obtained under S. 197 :

Held, that the accused did not act or purport to act in the discharge of their official duty within the meaning of S. 197 and the Magistrate, therefore, should not have dismissed the complaints on the ground of want of sanction under that section : ('39) 26 A. I. R. 1939 F. C. 43 and ('46) 33 A. I. R. 1946 F. C. 25, *Rel. on.* [P 435 C 1]

Criminal P. C.—

('46) Chitale, S. 197, N. 6.

('41) Mitra, p. 686, para. 644.

(b) Criminal P. C. (1898), S. 436 — Revision—Further inquiry—Power to order further inquiry in revision is discretionary—In circumstances of case, held further inquiry should not be ordered.

The revisional jurisdiction of the High Court is discretionary. [P 435 C 1]

The complainants who were students, were suspected to have taken part in a fracas. They agreed to submit to chastisement by the authorities of their school, if no prosecution was instituted against them. It was for the purpose of giving effect to this agreement that they were sent to the bungalow of the Deputy Commissioner who, not being satisfied with the chastisement inflicted by the physical instructor of their school, requested the Superintendent of Police, who happened to be present, to inflict the chastisement himself. He accordingly chastised the complainants. The com-

plainants lodged complaints against the officers under S. 323, Penal Code, but the Magistrate dismissed them for want of sanction under S. 197 :

Held that what was done was not only irregular but illegal. But the accused were acting from the best of motives. Though the chastisement which the complainants contemplated and agreed to was chastisement at the hands of the school authorities and not at the hands of an officer of police; but they did not suffer any such harm as could be considered excessive and they escaped the ignominy and risks of a prosecution. In these circumstances, it was not desirable, in the exercise of the discretionary powers, to direct further inquiry into the complaints. [P 435 C 1, 2]

Criminal P. C.—

('41) Chitale, S. 436, N. 5, Pt. 1

('41) Mitra, p. 1394, para. 1181.

Baldeva Sahay, Azadhesh Nandan Sahay and Phulan Prasad Varma—for Petitioners.

Advocate General—for opposite party.

Order.—This is an application for further enquiry into four complaints which have been dismissed, and comes before me on a difference of opinion between two of my learned colleagues. In each case the complainant is a student in the High School at Garhwa, and the material allegations in the four complaints are similar. It will, therefore, suffice to set out one of these complaints here :

[2] "The humble petition of complaint of the complainant most respectfully sheweth :—

(1) That the accused No. 1 is at present the Deputy Commissioner and accused No. 2 is at present the Superintendent of Police, Palamau and accused No. 3 is the physical instructor of the Govind High English School, Garhwa, where the complainant is a student.

(2) That on 3. 3. 1945, the accused No. 3 brought the complainant and six other boys of the school to the bungalow of the accused No. 1 at Daltonganj where accused No. 2 was also present for some reason which the complainant did not know at that time.

(3) That after some consultation between the three accused the complainant was made to outstretch himself with his feet on the ground and body on a raised platform in the bungalow of the accused No. 1 and remain in this position exposing his buttocks while accused No. 2 gave 7 strokes with walking stick supplied by the accused No. 1 in the manner given in the next para.

(4) That the accused No. 2 took the stick, retreated a few paces, ran forward and hit the complainant with the stick on his exposed buttocks putting all the strength, weight and momentum he could in the stroke and this was repeated six times more on the complainant when the complainant fainted. He regained his consciousness after few minutes.

(5) That thereafter similar treatment was meted out to other boys by accused No. 2 in the same manner.

(6) That terror-stricken and helpless as a sacrificial animal the complainant and the other students could not do anything.

(7) That overwhelmed by intense physical pain; and mental agony the complainant could not do anything that day which he had to pass on bed being unable to walk at all.

(8) That next day the complainant tried to get his injuries examined by a doctor and obtain a

certificate but as by that time the report of the incident had spread through the town no doctor was ready to do so, though several were approached; it is, therefore, fit and proper that your honour should examine the complainant and make a note of his injuries on the record or order some doctor to examine him in Court and give a certificate for which the complainant is ready to bear the cost.

(9) That the complainant had come to know that the matter was in connection with a fracas which took place between a circus party and some unknown men at Garhwa sometime ago; the circus people had lodged a F.I.R. making false allegations against the students of the Govind High School without naming anyone in particular; there was a test identification in course of which the complainant was not even identified; and as a matter of fact he never took any part in the incident at Garhwa.

(10) That the complainant had no idea that they were being taken to be caned when he was taken to Daltonganj.

(11) That the accused have caused severe voluntary hurt to the complainant in an inhuman manner and are punishable under S. 323, I. P. C.

It is therefore prayed that the accused may be summoned and dealt with according to law. And as in duty bound your petitioner shall ever pray."

[3] In each case the persons complained against were Mr. Ife, the Deputy Commissioner of Daltonganj, Mr. Treasure, the Superintendent of Police of Daltonganj and Mr. Harihar Tewary, the physical instructor at the High School at Garhwa. The complainants were dismissed on the ground that sanction for the prosecution of the accused had not been obtained under S. 197, Criminal P. C. The Judicial Commissioner has sent the cases back to the Magistrate for examination of the complainants and afforded them an opportunity of obtaining sanction for the prosecution. Section 197 is one of a group of sections in Part B of Chap. XV of the Code. The heading of Part B is "Conditions requisite for Initiation of Proceedings". Section 190 empowers certain Magistrates to take cognizance of an offence upon receiving a complaint of the facts constituting the offence, or upon a police report, or upon an information received from any person other than a police officer, or upon the Magistrate's own knowledge or suspicion that the offence has been committed. When the Magistrate acts on his own knowledge or suspicion, the magistrate is empowered by S. 191 to commit the case to the Court of Session or transfer it to another Magistrate; and S. 192 empowers certain Magistrates to transfer to a subordinate Magistrate any case in which cognizance has been taken by any of them.

[3A] Section 193 debars the Sessions Court from taking cognizance of an offence except where the case is committed to it by a properly empowered Magistrate. Section 194

deals with the power of the High Court to take cognizance of an offence upon commitment or upon information by the Advocate-General. Section 195 debars any Court from taking cognizance of certain offences except upon the complaint of certain public servants or Courts. Similarly, S. 196 debars any Court from taking cognizance of certain offences except upon a complaint or order of the Provincial Government or of some officer empowered by that Government. There is a similar bar to the power of a Court to take cognizance of the offence of criminal conspiracy under S. 196A. Section 196B contains special provisions relating to preliminary enquiries with regard to offences mentioned in S. 196 and 196A. Sections 198 to 199A debar a Court from taking cognizance of certain offences except upon the complaint of specified persons. The material provisions of S. 197 are:

[4] "..... When any Magistrate or when any public servant who is not removable from his office save by or with the sanction of a provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction"

of the Governor-General in certain cases and the Governor of the Province in certain other cases.

[5] For the purposes of the present case it is not disputed that first Harihar Tewary and after him, Mr. Treasure did chastise the complainants as alleged in the complaints, and that Mr. Ife abetted the other two accused persons. But it is contended by the Advocate-General that in doing what is attributed to them the accused were acting or purporting to act in the discharge of their official duty. If this contention be correct, no cognizance of the offences alleged to have been committed by the accused could be taken without proper sanction. No sanction having been obtained, it is necessary to determine whether the acts of the accused were committed by them while acting or purporting to act in the discharge of their official duty. The complainants do not now desire to prosecute Mr. Treasure. On behalf of the complainants it is contended that the question whether the other accused were acting or purporting to act in the discharge of their official duty must be determined on the allegations in the complaints, and that the complaints in the present instance do not disclose that the accused were so acting or purporting to act

in the discharge of their official duty. Reliance was placed on an observation of Sulaiman, J. in (1939) F. C. R. 159¹ that:

[6] "If the prosecution case as disclosed by the complaint shows that the act purported to be done in execution of duty, the proceedings must be dropped. But if the prosecution case does not involve this, the case cannot be thrown out on the preliminary ground of want of consent."

[7] This observation was cited with approval by the Federal Court in the more recent case in Criminal Appeal No. III of 1945, decided on 9th November 1945.² The facts alleged in the complaint in that case were that the complainant and his wife and certain other persons arrived at a steamer station shortly before a steamer, by which they proposed to travel, was due to leave. The complainant went to the booking office to purchase tickets. The booking clerk declined to issue tickets, alleging that it was very near the time fixed for the steamer's departure. In the meantime the complainant's wife and her companions had boarded the steamer. The complainant accordingly asked the Station Master to arrange for the issue of the required tickets. The Station Master refused and ordered the complainant to leave the booking office. The complainant then apparently made an attempt to board the steamer. There was then an altercation between the Station Master and the complainant, whereupon the Station Master ordered another man and some coolies to beat the complainant, and they did so. The Magistrate before whom this complaint was made was of the opinion that sanction under S. 270, Constitution Act, was necessary before proceedings could be instituted against the Station Master. The complainant then applied to the Governor of Bihar for sanction and was informed in reply that "he should seek his remedy in the superior Courts if his complaint is dismissed." When this reply was shown to the Magistrate he discharged the accused. The complainant then applied to the Sessions Judge for further enquiry into his complaint, and this was ordered. The Station Master moved this Court against the order directing further enquiry into the complaint, but his application was dismissed. He then appealed to the Federal Court. It was held that the act complained of could not be held

to be one done or purporting to be done in the execution of the appellant's duty as a servant of the Crown. There is a slight difference between the language of S. 270, Constitution Act, and S. 197, Criminal P. C. The former section refers to "an act done or purporting to be done in the execution of the duty of the accused as a servant of the Crown", while S. 197 refers to "an offence alleged to have been committed by the accused while acting or purporting to act in the discharge of his official duty." If there is any difference in the meaning of these two sections, it is somewhat difficult to grasp it. It may be assumed that it falls within the scope of the duty of the Deputy Commissioner and the Superintendent of Police to take such steps as the law permits to prevent the commission of offences, and, when an offence has been committed, to apprehend and bring the offenders, or alleged offenders, to trial. If, while discharging this duty, they are alleged so to have acted as to have committed an offence, I have no doubt that sanction for their prosecution is required, whether the case be one governed by S. 197 of the Code or by S. 270, Constitution Act. In the present instance we are not concerned with any act alleged to have been done by the accused for the purpose of preventing the commission of an offence, nor was the assault on the complainants committed while the accused were acting in the discharge of their duty to bring the complainants to trial for any offence alleged to have been committed by them. It is no part of the duty of a Deputy Commissioner, or an officer of the police force, to chastise persons who have committed, or who are alleged to have committed offences, even though it may be admitted by the persons accused of committing the offence that they have in fact committed it. Their duty is to apprehend the offenders and to produce them before a Court, and it is the duty of the Court alone to decide whether the alleged offence has been committed and what punishment should be inflicted on the offenders. In the judgment of one of the learned judges before whom this case first came there is a reference to S. 87, Penal Code. This section declares that nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause or be intended by the doer to cause to any person above the age of eighteen who has given consent, whether express or implied

1. (39) 26 A. I. R. 1939 F. C. 43 : I. L. R. (1939) Kar. 132; 1939 F. C. R. 159 : I. L. R. (1940) Lah. 400 : 181 I. C. 317 (F. C.), *Hori Ram Singh v. Emperor*.

2. Reported in (46) 33 A. I. R. 1946 F. C. 25 : I. L. R. (1945) Kar. F. C. 144 : 1945-7 F. C. R. 227 : 25 Pat. 46 (F. C.), *Sarjoo Prasad v. Emperor*.

to suffer that harm, or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm. The illustration to that section is the case of two persons agreeing to fence with each other for amusement. Such an agreement is stated to imply the consent of each to suffer any harm which in the course of such fencing may be caused without foul play, so that if one of the fencers, while playing fairly, hurts the other, no offence is committed. There is no evidence that the complainants in the present instance were over eighteen. Nor do I consider that S. 87, of the Penal Code was intended to apply to facts such as are before me in the present case. However that may be, in my view, the facts alleged in the complaints do not disclose that the accused were acting or purporting to act in the discharge of their official duty within the meaning of S. 197, Criminal P. C. The magistrate in my opinion, therefore, should not have dismissed the complaints on the ground that sanction for the prosecution of the accused had not been obtained under that section.

[8] The fact, however, remains that the complaints have been dismissed, and the question for my consideration is whether, in the exercise of revisional jurisdiction, further enquiry into the complaints should be made. The revisional jurisdiction of this Court is discretionary, and, in considering whether the discretion should be exercised in the present instance in favour of an order directing further enquiry into the complaint, I cannot ignore certain facts which are not disclosed by the complaints, but which appear from the judgment of the Judicial Commissioner of which there can be no doubt whatsoever. It appears that certain students at Garhwa sought to persuade the proprietor of a circus that they should be admitted at less than the rates which were being charged for admission to the circus. The proprietor refused to make any concession. In consequence of this refusal there was a fracas. The proprietor lodged a first information before the police. Being a stranger to the place he was unable to name any of the persons alleged to have taken part in the occurrence. The complainants, however, were suspected to have taken part in the occurrence, and it appears that they agreed to submit to chastisement by the authorities of their school, if no prosecution was instituted

against them. It was for the purpose of giving effect to this agreement that they were sent to the bungalow of the Deputy Commissioner for the purpose of receiving the chastisement to which they had agreed to submit at the hands of the physical instructor of the school. Mr. Ife, apparently, was not satisfied with the chastisement inflicted by the physical instructor of the school, and, therefore, requested the Superintendent of Police, who happened to be present, to inflict the chastisement himself. Now, I do not wish to be understood as in any way approving what was done. In my opinion it was not only irregular but illegal. But I have no doubt whatsoever that the officers concerned were acting from the best of motives. Instead of being charged in a Court with the commission of a criminal offence, and possibly, of being found guilty and sentenced to imprisonment, the complainants had agreed to submit to chastisement. It is true that the chastisement which they contemplated and agreed to was chastisement at the hands of one of the school authorities, and not at the hands of an officer of police; but they do not appear to have suffered any such harm as could be considered excessive and they have escaped the ignominy and risks of a prosecution. In these circumstances, I do not consider it desirable, in the exercise of discretionary powers, to direct further inquiry into the complaints, and I would, accordingly discharge this rule.

V.R./D.H.

Rule discharged.

A. I. R. (33) 1946 Patna 435 [C. N. 148]

IMAM J.

Chando Gangota and others — Petitioners v. Madan Mandal and others — Opposite party.

Criminal Revn. N. 17 of 1945, Decided on 15th January 1946, from order of Asst. Sessions Judge, Madhipura, D/ 21st July 1945.

Criminal P. C. (1898), Ss. 195(3), 408, 409 and 476 B. — Assistant Sessions Judge is subordinate to Court of Session for purposes of appeal under S. 476 B — Assistant Sessions Judge making complaint under S. 476 — Appeal lies to Court of Session under S. 476 B — Additional Sessions Judge can hear such appeal by virtue of S. 409.

An Assistant Sessions Judge is no doubt a member of the Court of Session but under S. 408, an appeal lies to Sessions Judge from a sentence passed by him except in cases where the sentence is above 4 years in which case it lies to High Court. According to S. 195 (3), read with S. 408, an Assistant Sessions Judge who passes a sentence of 4 years or less shall be deemed to be subordinate to the Court of Session and where he passes a sen-

tence exceeding 4 years he shall be deemed to be subordinate to the High Court. But according to proviso (a) to S. 195 (3), the Court of Session being a Court of inferior jurisdiction to High Court will be deemed to be the Court to which the Assistant Judge is subordinate for purposes of S. 476 B. Section 409 also provides that where an appeal is made to the Court of Session, it shall be heard by the Sessions Judge or by the Additional Sessions Judge. Consequently an Additional Sessions Judge has jurisdiction to hear an appeal under S. 476 B from an order of an Assistant Sessions Judge directing the filing of a complaint under S. 476. ('33) 20 A.I.R. 1933 Cal. 192 *Rel. on.* [P 436 C 2]

Criminal P. C.

('41) Chitale, S. 195, N. 18, pt. 2a; N. 19 and 20.

('41) Mitra, S. 195, p. 664, para. 631.

S. 476B, p. 1529, Note 'To which Court appeal lies'.

Sarjoo Prasad and R. K. Sinha —

for Petitioners.

Navadwip chandra Ghosh — for Opposite Party.

Order. — This is an application against the order of the Additional Sessions Judge of Bhagalpur withdrawing the complaint filed by the Assistant Sessions Judge of Madhipura against the opposite party for their prosecution under S. 211, Penal Code. It would appear that the opposite party had brought a case of dacoity and the Assistant Sessions Judge was of the opinion that he had brought a false case and accordingly he should be prosecuted. The Additional Sessions Judge did not read the judgment of the Assistant Sessions Judge to mean anything of the kind and he quoted passages from it to indicate that it was more a case of giving the accused in the dacoity the benefit of the doubt.

[2] In revision it is not for me to go into the merits of the decisions of the Additional Sessions Judge on the facts. Mr. Sarjoo Prasad appearing for the petitioners urged that in law the Additional Sessions Judge ought not to have heard the appeal under S. 476 B, Criminal P. C., as no appeal lay to him and his order withdrawing the complaint was without jurisdiction. He contended that the Additional Sessions Judge was not the Court to whom appeals ordinarily lie from a sentence passed by an Assistant Sessions Judge. He pointed out that the Assistant Sessions Judge was a member of the Court of Session as much as the Sessions Judge himself or the Additional Sessions Judge and accordingly the Court to which an appeal ordinarily lay was the High Court to whom the Court of Session was subordinate. Section 476B, which provides for an appeal against an order passed under S. 476, distinctly states the Court to which an appeal lies from an order passed under S. 476. It states that :

[3] "Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under S. 476 or S. 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, Sub-s. (3) and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or..."

[4] According to this Section then one has to refer to S. 195, sub-S. (3) to find out which is the Court to which an appeal lies from the Assistant Sessions Judge. Section 195 (3) states :

[5] "For the purposes of this Section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court."

[6] There is also a proviso (a) to this subsection which runs as follows:

"Where appeals lie to more than one Court, the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate."

[7] Section 408 provides for an appeal by a person on a trial held by "an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class . . . to the Court of Session". There is also a proviso to this section which states that when an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal shall lie to the High Court. There can be no doubt, having regard to the provisions of the Code that an Assistant Sessions Judge is a member of the Court of Session, but under the statutory law of the land it has been enacted that an appeal from an Assistant Sessions Judge, although a member of the Court of Session, shall lie to the Court of Session; but if the sentence passed by him is more than four years, it shall lie to the High Court. Mr. Sarjoo Prasad urges that it is patent that in such circumstances the appeal ordinarily lies to the High Court and it is the exception when the appeal lies to the Court of Session. I am not myself prepared to read S. 408 in this manner. The words are clear and simple and there can be no doubt as to their meaning. The section states specifically that an appeal lies to a Sessions Judge from the sentence of an Assistant Sessions Judge. It is only by the proviso that an appeal is provided to the High Court in cases where the sentences passed by the Assistant Sessions Judge are more than four years. At the best it may be said that there are two forums of appeal from a sentence passed by an Assistant Sessions

Judge; one, the Court of Sessions and the other, the High Court, depending upon the sentence passed. In this connection the provisions of S. 195 (3) and its proviso (a) have to be borne in mind. In my opinion according to these provisions read along with S. 408 of the code, an Assistant Sessions Judge who passes a sentence of four years or less shall be deemed to be subordinate to the Court of Sessions and where he passes a sentence exceeding four years, he shall be deemed to be subordinate to the High Court. The proviso (a) of section 195 (3) is very important and must be given effect to. As the Code contemplated two forums of appeal from sentences passed by an Assistant Sessions Judge, it is clear that appeals from his sentence lie to more than one court and as the Court of Session is a court of inferior jurisdiction to the High Court, it is the Court of Session which will be deemed to be the court to which the Assistant Sessions Judge was subordinate for the purposes of S. 476B. Section 409 also provides that where an appeal is made to the Court of Sessions, it shall be heard by the Sessions Judge or by the Additional Sessions Judge. There are numerous examples both in this country and in England where appeals are provided for from the judgment of a single Judge to the Divisional Bench of the same Court, and there could be no doubt that the single Judge in the particular circumstance, would be subordinate to the Divisional Bench. I expressed this view during the arguments to Mr. Sarjoo Prasad appearing for the petitioner and I am happy to find that decisions from Madras, Bombay and Calcutta happen to take a similar view. Indeed in 60 Cal. 596¹ it was decided that appeals ordinarily lay under section 476B from an order of an Assistant Sessions Judge to the Court of Session. Having regard to the provisions of section 409, such an appeal could be heard by an Additional Sessions Judge who was a member of the Court of Session. The point raised by Mr. Sarjoo Prasad, therefore, fails and the application is dismissed.

K.S./D.H. *Application dismissed.*

1. ('33) 20 A. I. R. 1933 Cal. 192 : 60 Cal. 596 : 143 I. C. 703, Nagendranath v. Emperor.

A. I. R. (33) 1946 Patna 437 [C. N. 149]

FAZL ALI C. J. AND RAY J.

Chitru Tanti—Appellant. v. Tata Iron and Steel Co. Ltd.—Respondents.

Appeals Nos. 362 of 1943 and 194 of 1944, Decided on 18th February 1946, from order of the Commissioner under Workmen's Compensation Act, Jamshedpur, D/-23rd August 1943.

(a) Workmen's Compensation Act, (1923), S. 2 (1) (m) — 'Wages'—Profit sharing bonus scheme of a Company under which its employees were declared entitled to certain bonus in good years—Bonus held included within term 'wages.'

Under a profit sharing bonus scheme introduced by a Company, its employees were entitled to receive a share of the profits in good years on a definite scale. The employees who were in continuous employment of the company throughout its official year and those whose services terminated between the end of the year and the first payment date were declared entitled to claim the bonus. These details of the scheme were set out in two notices which were issued by the General Manager of the Company to the employees of the Company:

Held, (1) that though granting of bonus was not part of original contract of employment, the words of the notices which declared the scheme were clear and left no doubt that the intention of the Company was that the workmen should deem themselves to be entitled to the profit sharing bonus and the use of word 'entitled' in the notices was sufficient to show that the payment of bonus was made part of the contract of service. [P 439 C 2]

(2) That the profit sharing bonus did not come within the exceptions mentioned in S. 2 (1) (m). The receiving of the bonus being a privilege or benefit enjoyed by a workman, which was capable of being estimated in money was covered by the definition of the term 'wages' as given in S. 2 (1), cl. (m). To hold otherwise would be to unduly restrict the meaning given to the expression. (1911) 1 K. B. 360 *Rel. on.* [P 438 C 2; P 439 C 1]

(b) Workmen's Compensation Act (1923), S. 5 (1) (a)—Bonus to workman declared after date of accident—Workman being in continuous employment for full official year ending before accident entitled to bonus—Bonus held formed part of 'total wages falling due for payment' for purposes of compensation.

According to the profit sharing bonus scheme of a Company whenever a bonus might be declared, a workman became entitled to it if he had been in continuous employment of the Company throughout the Company's official year which ended on 31st March 1942. A workman in continuous employment of the Company during its official year ending on 31st March 1942 met with an accident in June 1942. The profit sharing bonus for the official year was declared in July 1942:

Held, that it could not be said that the bonus did not become due until it was declared and therefore was not part of his 'total wages falling due for payment' within cl. (a) of S. 5 (1). [P 440 C 1]

The workman having earned that bonus under the terms of its scheme on the date of the accident it formed part of his total wages and must be taken into account in assessing the compensation payable under the Act. [P 440 C 1]

P. R. Das, Baldeva Sahay, L. K. Choudhury (in No. 194) and R. S. Chatterji (in No. 362)—for Appellant.

P. R. Das, Baldeva Sahay, L. K. Chowdhury (in No. 362)—for Respondent.

Fazl Ali, C. J.—The principal point to be decided in these two appeals is whether the expression "wages" as used in the Workmen's Compensation Act includes such profit sharing bonus as is granted by the Tata Iron and Steel Co. Ltd., to their employees under a scheme introduced by the Company some time ago. The details of the scheme are set out in two notices which are issued by the General Manager of the Company to the employees of the Company on 27th May and 31st May 1937 respectively. The first notice, after stating that the Directors of the Company have decided to introduce a regular profit sharing scheme in the interests of the employees so that in good years the employees will be receiving a share of the profits on a definite scale, proceeds to describe the manner in which the profit sharing bonus is to be computed. The notice of 31st May 1937 states among other things that:

[2] "those employees will be entitled to the profit sharing bonus who have been in the continuous employment of the Company throughout the company's official year to which it applies and that if the employee's service has terminated between the end of the year and the first payment date, he (or in the case of a deceased employee, the person or persons entitled to it) may claim payment of the full bonus amount on that date."

[3] I will now briefly narrate the facts with which we are concerned in the two appeals. Miscellaneous Appeal No. 194 has been preferred by the Company against one Kanhai Zaria Ganera and is directed against the decision of Mr. Barr, a Commissioner under the Workmen's Compensation Act holding that the profit sharing bonus should be included in the assessment as part of the wages for the purpose of determining the compensation payable to the workman concerned. It appears that the respondent while in the employment of the Company injured his right elbow in July 1942. The injury was at first diagnosed as a sprain, but it was subsequently found that the elbow had been slightly fractured and the workman had been permanently disabled below the elbow. The commissioner has assessed the loss of the earning capacity of this workman at ten per cent and this finding having been accepted before us the only question which we have been asked to determine is whether the Commissioner is right in holding that

in assessing compensation the profit sharing bonus should be taken into consideration. In Misc. Appeal No. 362 the appellant is the husband of a deceased female workman named Nagi Tanti. This workman received certain injuries in an accident arising out of and in the course of her employment on 20th June 1942 and died as a result of those injuries. She used to receive wages at the rate of seven annas six pies per day together with a dearness allowance of Rs. 4 per month and also an emergency bonus of Rs. 5 per mensem. Under the profits sharing scheme, to which reference has been made, she was entitled to a profit sharing bonus of three months wages per year of service. The appellant claimed compensation as a dependent of Nagi Tanti deceased and prayed that the profit sharing bonus should be included in the assessment of the compensation. This claim was resisted by the Company and the objection of the Company has been upheld by the learned Commissioner. Thus it appears that in one of the cases the learned commissioner has held that the term "wages" includes profit sharing bonus and in the other case he has held that it does not. The question to be decided is, which of the two views is correct. Section 2, cl. (1), sub-cl. (m), Workmen's Compensation Act, runs as follows:

[4] "'Wages' includes any privilege or benefit which is capable of being estimated in money other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment".

[5] In his order under appeal in Misc. Appeal No. 362 of 1943, the learned Commissioner has referred to the definition of wages in s. 2, cl. (6), Payment of Wages Act, but with this definition we are not concerned in the two appeals before us. The whole question is whether the expression "wages" as used in s. 2, cl. (1), sub-cl. (m) includes profit sharing bonus. This clause mentions certain exceptions which are expressly excluded from the definition of wages. The profit sharing bonus does not come within the exceptions. It is certainly a privilege or benefit capable of being estimated in money and is therefore apparently covered by the definition of wages as given in sub-cl. (m) of s. 2. But it is contended that the basic idea underlying the expression "wages" is that it must be something payable under a contract of service and in lieu of the work done by a particular workman and therefore it cannot include

something which is payable at the will and discretion of the employer independently of the contract of service and which is conditional upon the happening of certain events which may or may not happen every year (e. g. the prosperous working of the Company). It is pointed out on behalf of the Company that the profit sharing bonus by its nature may or may not be payable in a particular year and it is said that such a payment which is uncertain could not have been intended to cover the expression "wages" as given in the Act. In my opinion the contention put forward on behalf of the Company is not sound. Whatever may be the strict and literal meaning of the expression "wages," the Act expressly says that the expression "wages" shall include any privilege or benefit enjoyed by a workman which is capable of being estimated in money. There can be no doubt that the receiving of bonus is a benefit enjoyed by a workman. In my opinion therefore to hold that the expression "wages" as defined in the Act was not intended to include the profit sharing bonus will be to unduly restrict the meaning given to the expression in the Act.

[6] The view which I have expressed is supported by the decision of the Court of Appeal in England in (1911) 1 K. B. 360¹. In that case claim for compensation was made by the widow of the purser of a ship which was lost with all hands. The purser in addition to the regular wages, at the end of each voyage, whenever everything was reported to be satisfactory, received at a fixed rate per month a bonus or extra wages. He also made some profit by the sale on board ship of whisky in nips. The question was as to whether the bonus and the profits made by the purser on the sale of whisky was included within the term remuneration which occurs in S. 13, Workmen's Compensation Act, 1906 which was then in force in England. It was held by the Court of Appeal that it did and dealing with the argument that the bonus could not be included in the term "remuneration" because it was a conditional payment, Cozens-Hardy, M. R. observed as follows :

[7] "But then it is urged that this was only a conditional payment, and that a sum which may or may not become payable ought not to be considered in ascertaining the amount of remuneration. I am unable to follow this. Nothing is more common than that remuneration should vary according as the gross takings or the net profits of a business do or do not exceed a certain figure".

1. (1911) 1 K. B. 360 : 80 L. J. K. B. 442 : 103 T. T. 741, Skalias v. Blue Anchor Line.

[8] Farewell, L. J. was also of the same opinion and dealt with the point as follows:

[9] "Treating "remuneration" then as synonymous with earnings, I cannot doubt that the so-called bonus must be taken into account, I agree with the Master of the Rolls that reading the letter to Captain Ilbery of October 16, 1906, which imposed on him a duty to be performed by him at once, and coupling that with the fact that the deceased was in fact paid extra wages, that the documents put in shew that the employers acknowledged that he was "entitled" to these sums, as "extra wages" and that he gave receipts for the same the inference is irresistible that these payments were part of his wages and must be taken into account accordingly, and that there is ample evidence of contract. Even apart from the letter, and if there were nothing but the note acknowledging the liability and the receipt, I am of opinion that there would be ample evidence. I know of no way in which a man can be "entitled to extra wages" except by contract, and I feel no difficulty in the use of the word "conditional". Agreed additional remuneration contingent on a quick passage, or on a dividend exceeding 5 per cent would clearly fall within the word "remuneration" in the Act, although the quickness or the increased dividend depended on luck and were independent of the employee's own conduct".

[10] In the two cases before us although it must be conceded that the granting of bonus was not part of the original contract of employment, yet the words used in the notices to which reference has been made, are clear and leave no doubt that what was intended was that the workmen should deem themselves to be entitled to the profit sharing bonus promised in them in those cases where the profit of the Company exceeds a certain level. I have already quoted an extract from the second notice which states that those employees will be entitled to the profit sharing bonus who have been in continuous service of the Company throughout the Company's official year. The same notice states that though the service has terminated between the end of the year and the first payment date, the employee or his dependent, as the case may be, *will be entitled* to the payment of the full bonus. As Farewell, L. J. says, the use of the word "entitled" is sufficient to show that the payment of the bonus was made part of the contract of service. I have therefore no doubt in my mind that in the assessment of compensation "profit sharing bonus" should be included as part of the wages.

[11] The only other contention put forward on behalf of the Company is that the claim made in these appeals must fail because in both the cases the bonus became payable after the date of the accident on account of which compensation

is claimed against the Company. As I have already stated in one of the cases the accident took place in June 1942 and in another in July 1942. The bonus for the year was, however, declared after July 1942. According to Sch. IV the compensation is to be calculated on monthly wages and S. 5 of the Act gives the method of calculating the monthly wages and states among other things that :

[12] "Where the workman has, during a continuous period of not less than 12 months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the workman shall be one twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period."

[13] The words which occur in this provision are — "total wages which have fallen due for payment" to the workman in the last 12 months of that period. It is contended on behalf of the Company that the bonus was not due until it was declared and inasmuch as the bonus was declared in 1942 after the date of the accident therefore it could not be taken into account for the purpose of assessing compensation. At first sight the argument appears to be plausible but in dealing with it we must take into consideration the profit sharing scheme under which the bonus is granted. According to that scheme whenever a bonus might be declared, a workman becomes entitled to it if he has been in continuous employment of the company throughout the company's official year. It was not disputed that the official year of the Company in these cases ended on 31st March 1942. The second notice makes it clear that even if the employee's service has terminated before the first payment date, he will be entitled to claim payment of the bonus if he has been in continuous employment of the Company throughout the official year. Both the workmen with whom we are concerned were in the continuous employment throughout the official year and therefore they earned their bonus at the time of the accident. In these circumstances the objection raised on behalf of the Company must fail. I would, therefore, allow Misc. Appeal No. 362 with costs and dismiss Misc. Appeal No. 194 with costs and direct that in both these cases the profit sharing bonus earned by the workmen concerned should be taken into account in assessing the compensation payable under the Act.

Ray, J.—I agree.

D.R./D.H.:

Appeal allowed.

AGARWALA J.

Sri Gouri Shankar Umanath and others—Appellants v. Mangal Mahton and others.—Respondents.

Appeal No. 528 of 1944, Decided on 7th December 1945, from Appellate Decree of Addl. Dist. Judge, Patna, D/- 4th February 1944.

(a) Civil P.C. (1908), S. 100—Finding of fact by lower Court that plaintiffs had not been repaid—Finding challenged by defendants on ground that onus was wrongly placed on them—Question of onus held, did not arise as there was conflicting evidence—Finding was binding in second appeal.

The finding of fact arrived at by the lower Court that the plaintiffs had not been repaid was challenged by the defendants in second appeal and it was contended that the onus of proving this had been wrongly placed on them instead of on the plaintiffs:

Held that as there was conflicting evidence on the point no question of onus arose, and the Court had come to a conclusion which was binding in second appeal as a finding of fact. [P 441 C1]

(b) Civil P. C. (1908), O. 1, R. 10—Parties—Misdescription—Amendment—Limitation—Omission to describe defendant as shebait held, was mere misdescription, and suit was within time.

A suit on mortgage was instituted on 3-9-1941, only one day before the expiry of limitation. The sons of the mortgagor had already transferred their interests in the property and the vendees were made defendants. Each of the vendees took a one-third share in the property. Amongst them was one M, a shebait of a deity. In the plaint, there was no mention of the deity but on 11-3-1943 the plaintiff was allowed to amend his plaint by adding to the name of M, a description of him as a shebait of the deity that had purchased one-third share of the property. It was contended that as the deity was not impleaded as a necessary party to the suit within the period of limitation, the suit must fail:

Held that the objection raised was a technicality and before a technicality was permitted to obstruct the course of justice it must be seen what the substantial question in issue was. Though M was impleaded as a defendant in the suit no cause of action was alleged against him apart from the sale by the sons of the original mortgagor. He was, therefore, being sued in respect of the interest that had been sold by the sons of the original mortgagor. M had not personally purchased any part of that interest. The only ground on which M was liable to be impleaded on the mortgage was in his capacity of a shebait to one of the vendees, and the omission to describe him as a shebait was a mere misdescription and hence the suit was within time. (26) 13 A.I.R. 1926 Pat. 40 Rel. on. (25) 12 A.I.R. 1925 Pat. 37 Ref. [P 441 C 2]

Sarjoo Prasad and Rai Paras Nath— for Appellants.

S.N. Bose, K.K. Sinha and S. M. Siddique— for Respondents.

Judgment.—This is an appeal by defendants 5-7 and arises out of a suit on a mortgage executed by one Hussaini Mian, the father of defendants 2-4, in favour of

the plaintiff and his brother defendant No. 8. The last date within which this suit could have been filed within time was 4th September 1941. It was filed one day previously. Before the institution of the suit, defendants 2-4 had transferred their interest in the property to defendants Nos. 5-7. Each of the vendees took a one-third share in the property, Mewa Mahton, the shebait of a deity which was one of the vendees. In the plaint there is no mention of the deity, but on 11th March 1943, the plaintiff was allowed to amend his plaint by adding to the name of Mewa Mahton, defendant No. 5, a description of him as shebait of the deity that has purchased the one-third share in the property. The Court of first instance dismissed the suit holding that the mortgage debt had been discharged by defendants 2-4. On appeal by the plaintiff, the lower appellate Court has held that the mortgage debt has been discharged only to the extent of the interest of defendant No. 8 and that the liability to the plaintiff is still outstanding.

[2] Two points have been raised in this appeal on behalf of the appellants, defendants 2-4. They challenge the finding of fact of the Court below that the plaintiff has not been repaid and complain that the onus of proving this has been laid on them instead of on the plaintiff. No question of onus arises as there was conflicting evidence on the point and the Court has come to a conclusion which is binding on me as a finding of fact.

[3] The second point relates to the question of non-joinder. It is contended that the deity was a necessary party to the suit and that as it was not impleaded within the period of limitation the suit must fail. Reliance was placed on a decision of this Court in 3 Pat. 230¹. The facts of this case were that a suit was instituted against the Agent of the East Indian Railway Company. It was held that the plaintiff was not entitled to amend his plaint after the expiry of the period of limitation by substituting the Company itself for the agent who was originally sued. Das, J. who delivered the judgment in this case observed:

[4] "When there were two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no question of representation arises in this case, it is im-

possible to maintain the view that the case is one of misdescription."

[5] The suit was accordingly dismissed against the Company. This decision was referred to in a later decision of this Court in 5 Pat. 128² where it was observed:

[6] "If, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant, then the suit may proceed against the Company."

[7] The objection raised by the appellants is a technicality and before a technicality is permitted to obstruct the course of justice, it must be seen what substantial question in issue is. Now the plaint discloses that the interest of the original mortgagor has been purchased, in equal shares by three persons, defendants 5-7 of whom defendant 5 latter (*sic*) is a deity. Although Mewa Mahton was impleaded as a defendant in the suit, no cause of action was alleged against him apart from the sale, by the sons of the original mortgagor. He was, therefore, being sued in respect of the interest that had been sold by the sons of the original mortgagor. He himself had not personally purchased any part of that interest. The only ground on which he was liable to be impleaded on the mortgage was in his capacity of a shebait to one of the vendees. In these circumstances the omission to describe him as a shebait or to sue the deity through him as shebait should, in my opinion, be regarded as a mere mis-description, the shebait being the real defendant. In my opinion, therefore, the decision of the Court below on this point is correct and I would dismiss this appeal, but in the circumstances, without costs.

V.W./D.H.

Appeal dismissed.

2. ('26) 13 A. I. R. 1926 Pat. 40 : 5 Pat. 128 : 90
I.C. 680, Radhelal v. E. I. Ry. Co. Ltd.

A. I. R. (33) 1946 Patna 441 [C. N. 151]

FAZL ALI C. J. AND AGARWALA J.

Province of Bihar — Decree-holder — Appellant v. Darbari Misser — Judgment-debtor — Respondent.

Letters Patent Appeal No. 20 of 1944, Decided on 7th January 1946, from judgment of Manohar Lall J. D/- 11th May 1944, in Misc. S. A. No. 311 of 1943.

Civil P. C. (1908) S. 11—Execution application for arrest—Objection to, by judgment-debtor on ground of decree being rent-decree—Order of dismissal of application on decree-holder admitting objection—Order held decided that decree was rent-decree and operated as res judicata.

The decree-holder applied for execution of his decree by the arrest of the judgment-debtor and

1. ('25) 12 A. I. R. 1925 Pat. 37 : 3 Pat. 230 : 78
I. C. 312, E. I. Ry. Co. v. Ram Lakhan Ram.

the latter objected to the execution on the ground that the decree being for arrears of rent he was not liable to be arrested under S. 177A (a) Bihar Tenancy Act. It being conceded on behalf of the decree-holder that the objection was well-founded, order dismissing the application was passed. Subsequently, the decree-holder again applied for execution by attachment and sale of the judgment-debtor's house and the latter resisted it on the ground that the house could not be attached and sold because the decree was passed for arrears of rent due in respect of other lands than the site of the house in question, but the Court disallowed the objection holding that the decree was not a rent-decree and, therefore, S. 177 A, could not be invoked.

Held that the question whether the decree was a rent-decree or not was directly put into issue in the previous proceeding. That was the foundation of judgment-debtor's objection, and the Court in disposing of the objection had to decide one way or the other. The matter, therefore, was *res judicata* and the decree must be treated as rent-decree because the order of the Court in the previous proceeding was passed upon that view. 39 Cal. 848 *Explained*. [P 443 C 1,2]

Civil P. C.

('44) Chitale, S. 11, Notes, 23 and 100.

('41) Mulla, P. 88, N. "Order in execution proceedings," P. 79, N. "Heard and finally decided."

Sarjoo Prasad — for Appellant.

M. N. Lall — for Respondent.

Fazl Ali, C. J. — This is a Letters Patent appeal from the decision of Manohar Lall J. in Misc. S. A. No. 311 of 1943, arising out of an execution proceeding.

[2] The facts of the present case are fully set out in the judgment of Manohar Lall J., and may also be briefly recapitulated here. The respondent took a lease from the Director of Agriculture, Bihar, some time ago for three years and, after the expiry of the lease, the appellant brought a suit to recover arrears of rent for a certain period. The suit was decreed on 26th May 1939, and the appellant applied for the execution of the decree by the arrest of the judgment-debtor. The respondent judgment-debtor objected to the execution mainly on the ground that the decree being for arrears of rent, he was not liable to be arrested under S. 177A, Bihar Tenancy Act. Section 177A provides that :

[3] "Notwithstanding any thing to the contrary contained in the Code of Civil Procedure, 1908, a decree for arrears of rent obtained against a raiyat or an under-raiyat shall not be executed- (a) by the detention in the civil prison of the judgment-debtor, or (b) by the sale of houses and other buildings with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment, belonging to the raiyat or under-raiyat and occupied by him".

[4] This section also provides that any house or building and the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their

enjoyment may be sold in the execution of a decree for arrears of rent due in respect of the site of such house or building.

[5] In resisting the execution proceeding the respondent evidently relied on cl. (a) of S. 177A, and the Government Pleader, who appeared for the appellant-decree-holder, conceded that the objection of the judgment-debtor was well-founded and he could not be arrested. Ultimately, the objection of the judgment-debtor was upheld, and the appellant's application for his arrest was dismissed. In 1942 the appellant again applied for the execution of the decree and in this execution he prayed for the attachment and sale of the respondent's house. The respondent resisted the application on the ground that his house could not be attached and sold because the decree was passed for arrears of rent due in respect of other lands than the site of the house in question. The Munsif disallowed the objection holding that the decree was not a rent-decree and, therefore, S. 177A, Bihar Tenancy Act, could not be invoked by the respondent in his favour. The learned Subordinate Judge, however, took a different view on appeal and held that the decree was a rent-decree and the respondent was protected by S. 177A. Then there was a second appeal by the appellant, and the learned Single Judge of this Court came to the conclusion that though in point of law the decree under execution was not a decree for rent, yet the respondent's house could not be attached because it had been held previously, though wrongly, that the decree was a rent-decree, and the matter was *res judicata*. The appellant has now preferred this appeal under the Letters Patent.

[6] There are two contentions put forward by the appellant in this case. In the first place, it is contended that the decision of the Munsif in the previous execution proceeding was really based upon the admission made by the Government Pleader and, therefore, it had not the force of a decree. It was merely a consent order, and the Munsif never tried to adjudicate the question as to whether the decree was a rent-decree or not. In my opinion, this contention must fail. The respondent clearly raised the contention in the previous execution proceeding that the decree in question was a rent-decree and the order of the Munsif was passed upon the footing that the decree was a rent-decree. The mere fact that the Government Pleader admitted that the decree was a rent-decree is not material. The order of the Munsif was final and could have been appealed against

The appellant, however, did not appeal against the order.

[7] It was next contended that a wrong decision on a question of law cannot operate as *res judicata*, and reliance was placed upon 39 Cal. 848¹. It was held in that case that a decision in a previous execution proceeding, which merely lays down what the law is and is found to be erroneous, cannot have the force of *res judicata* in a subsequent proceeding for a different relief. What happened in that case was this: A certain decree-holder in a previous execution proceeding attached an allowance payable to the respondent. The attachment was contested but the case was decided against the respondent, and the decision was not appealed against. Subsequently, in a case between the respondent and another creditor, to which the appellant was not a party, it was held that the allowance could not be attached, and that instalments could not be attached before they respectively fell due. The appellant again took out execution and the respondent again pleaded that the attachment could not be made. The plea was accepted by the Subordinate Judge, and the decree-holder preferred an appeal. In appeal it was held by the Calcutta High Court that the order made in the previous execution proceeding that the allowance was attachable was not *res judicata*. This decision was explained in one of the concluding paragraphs of the judgment in these words:

[8] "We think, therefore, that although it was decided between the parties in a previous execution proceeding that the allowance could be attached, the Subordinate Judge has no more power now than he really had then, to attach the allowance before it was due; and that the former decision cannot alter the law in this respect or give the Subordinate Judge a jurisdiction that he would not otherwise possess."

From these observations it would appear that what the learned judges really held was that in the first case it need not have been decided that an allowance could be attached before it was due, and if any decision was wrongly given, that was merely a wrong statement of law and could not have the force of *res judicata* in a subsequent proceeding for a different relief.

[9] In the present case the question as to whether the decree was a rent-decree or not was directly put into issue in the previous proceeding. That was the founda-

1. (12) 39 Cal. 848 : 14 I. C. 124, Baij Nath Goenka v. Pudmanand Singh.

tion of the respondent's objection, and the Court in disposing of the objection had to decide one way or the other. The Government Pleader conceded that the decree was a rent-decree and, thereafter, an order was made by the Court that the respondent could not be arrested. That order could not have been passed unless the Munsif was of the view that the decree was a rent-decree. The effect of the decision, therefore, was that the contention of the judgment-debtor was accepted. The order of the Munsif became final because it was not appealed against. It is conceded that in the present case, if it is held that the decree is a rent-decree, the respondent's house cannot be attached. In my opinion, the matter is now *res judicata* and the Court has to treat the decree as a rent-decree because the order of the Munsif in the previous proceeding was passed upon that view. The matter cannot now be investigated afresh, and in this view I would dismiss the appeal, but in the circumstances of the case make no order as to costs.

Agarwala, J. — I agree.

G.M./D.H.

Appeal dismissed.

A. I. R. (33) 1946 Patna 443 [C. N. 152]

FAZL ALI C. J. AND MANOHAR LALL J.

Commissioner of Income-Tax, B. & O. Patna — Applicant v. Sm. Chandramoni Pattamahadevi Rani Saheba, — Respondent.

Misc. Judicial case No. 33 of 1944, Decided on 9th January 1946.

Income-tax Act (1922), S. 14 (1) — Maintenance allowance of Hindu widow, distant relation of holder of impartible estate, secured to her by a formal deed—No indication that allowance was given to her as member of undivided family—Allowance not liable to cease on her ceasing to be member of undivided family—Allowance is not exempt from taxation under S. 14 (1).

By a deed dated 28-6-1926 the assessee A, a Hindu widow and a remote relative of B, the holder of an impartible estate of Jeypore "surrendered", conveyed and assigned to B all her rights in estate M. By the same deed B agreed to pay to A as an allowance for her residence and maintenance the sum of Rs 1650 per month i. e. 19,800 in a year, which was also made a first charge on estate M. A received Rs. 19800 from B in accordance with the deed in the account year and the question was whether the sum was liable to taxation or exempt therefrom under S. 14 (1), Income-tax Act :

Held that the unfailing test for the applicability of S. 14 (1) is to determine whether the allowance would cease if the assessee ceased to be a member of the undivided family. In this case the answer was necessarily against the assessee as she was

entitled to the allowance under the registered deed and the deed did not say that she would receive the allowance only so long as she was the member of the Hindu undivided family. Moreover it was not at all clear that the assessee had received the allowance as a member of a Hindu undivided family. There was nothing to show that she used to receive any allowance before the deed was executed or any statement in the deed that the allowance was paid to her as such member. The fact that it was made a charge on estate *M* and not on Jeypore Estate also incidentally showed that *B* was not liable to pay her any allowance as member of his undivided family. Further, at the date of the deed, *A* was not legally entitled to claim maintenance from the holder of the Jeypore estate apart from custom and possibly that was the reason why *A* chose to secure a maintenance allowance for herself by means of a formal deed of agreement and if she chose to enter into an agreement with *B* which made it incumbent upon him to pay certain allowances to her, apart from her position in the family, it could not be said that she received that allowance as a member of the Hindu undivided family. The allowance, therefore, was not exempt from taxation under S. 14 (1), Income Tax Act. ('45) 32 A.I.R. 1945 Oudh 55 *Rel. on; Case law discussed.*

[P 446 C 1, 2; P 447 C 1]

S. N. Dutt—for Applicant.

P. R. Das and G. C. Das—for Respondent.

Fazl Ali, C. J.—In this reference two questions of law have been referred to us for our opinion, namely :

(1) Whether in the circumstances of the case the sum of Rs. 19,800 received by the assessee from the Maharaja of Jeypore is exempt from Income-tax under S. 14 (1), Income-tax Act?

(2) Whether the Madras Impartible Estates Act, 1904, as amended in 1934 has any application to the facts and circumstances of the case?

It was conceded on behalf of the assessee, that the Madras Impartible Estates Act, 1904, as amended in 1934, has no application to the facts and circumstances of this case. Therefore the second question must be answered in the negative.

[2] As to the first question, I shall have to refer to certain facts before answering it. In the appellate order of the Income-tax Tribunal there is a reference to two pedigrees, one of Jeypore family and another of Madgole family. It is common ground that these two families are connected by marriage only. It appears that one Makund Deo No. 1, a junior member of the Jeypore family married a lady belonging to the Madgole family who bore him a son named Krishan Deo. After the death of Krishan Deo, a dispute arose between his son Maukund Deo No. 2, the husband of the assessee, and one Rajendramoni Debi another member of the Madgole family about the ownership of the Mad-

gole estate. Ultimately there was a compromise by which a small part of the estate was given to Rajendramoni in absolute right and the rest of the estate was divided equally between Mukund Deo No. 2 and Rajendramoni subject to the qualification that Rajendramoni was to enjoy her share of the estate only during her lifetime and upon her death it was to devolve upon Mukund Deo. After the compromise Mukund Deo and Rajendramoni brought a suit against the present Maharaja Ramchandra Deo and the late Maharaja Vikram Deo for the redemption of a mortgage relating to half the estate. Ultimately the parties compromised this dispute and a decree was passed providing for the redemption of the property upon payment of Rs. 4,40,400. For the payment of this amount, Mukund Deo and Rajendramoni executed a registered sale deed in favour of the two Maharajas in respect of half the Madgole estate. Upon the death of Mukund Deo the assessee and her mother-in-law executed a registered deed in favour of Maharaja Vikram Deo and Maharaja Ramchandra Deo which provided, among other things, that upon the death of the two executants and of Rajendramoni, the Madgole estate would devolve upon the two Maharajas who were described as the nearest heirs to the last male holder of the estate. On 28th June 1928, the assessee (her mother-in-law having died in the meantime) executed a deed by which she "surrendered, conveyed and assigned" to Maharaja Ramchandra Deo the entire Madgole estate which had been left in her possession as well as the vested remainder in that portion of the estate in which Rajendramoni had a life estate. Under para. 10 of this deed Ramchandra Deo agreed to pay to the assessee monthly a sum of Rs. 1500 as maintenance allowance and a sum of Rs. 150 as allowance for her residence; and under para. 12 the total sum of Rs. 1650 per mensem was made the first charge on the Madgole estate. In accordance with this agreement the assessee received the sum of Rs. 19,800 as allowance in the year of account, and thus a question arose as to whether this sum was liable to taxation or was exempt therefrom under S. 14 (1), Income-tax Act. The view expressed by the Income-tax officer and the Assistant Commissioner of Income-tax was that this sum was taxable, but the Income-tax Tribunal held in its appellate order under S. 33 of the Act that this sum was exempt from taxation. The tribunal in coming to this decision relied in the first instance on the Madras Impartible

Estates Act, 1904, which is now conceded to have no application. They also held after referring to a number of decisions relating to impartible property that the sum in question was received by the assessee as a member of a Hindu undivided family and was, therefore, exempt from taxation under S. 14 (1) of the Act. They held as a fact that the assessee was a member of the Jeypore family which was a Hindu undivided family and concluded by saying:

"If it be considered that the appellant has not parted with the property represented by amount of maintenance, it will be agricultural income".

[3] After this decision the Commissioner of Income-tax made an application to the Tribunal asking them to refer the two questions, which are set out above, to the High Court; but they dismissed the application and while dismissing it they observed as follows:

[4] "For the reasons stated fully in our said order we held that the widow surrendered her right in the property of the Hindu Undivided family to the next male reversioner reserving maintenance to herself, and that the respondent received the amount as a member of the Hindu Undivided family and she was entitled to exemption under S. 14 (1), Income-tax Act. We further held that if it be considered that the respondent had not surrendered the widow's estate then she had not parted with the property represented by the money received when the receipt will be from her own estate and the income therefore was agricultural and exempt under S. 2 (1), Income-tax Act. The decision of the Tribunal was therefore on two alternative grounds and based on the relief admissible under two different Ss. 2 (1) and 14 (1). The applicant has now raised questions of law in regard to the first ground whether the amount was received as a member of the Hindu Undivided Family. The question arising out of the decision we gave that it was not exempt under the provisions of S. 14 (1) (sic) it will be exempt under the provision of S. 2 (1) has not been raised. As this latter finding has become final now any answer on the reference on the first point alone will not disturb the final result of this Tribunal's order. At such a stage the opinion of the High Court will be obtained only on an academic point. We see no justification for making any such reference. We do not therefore propose to refer the questions to the High Court, as being infructuous".

[5] After this order this Court was moved by the Commissioner of Income-tax to direct the Tribunal to submit a statement of the case under S. 66 and hence this reference.

[6] The first point raised by the assessee before us was that in view of the observations of the Tribunal which have been quoted above, question No. 1 becomes academic and it is not necessary for this Court to answer it. On the other hand, it was contended on behalf of the Commissioner of Income-tax that the order of the Tribunal made under S. 33 of the Act contains no final decision as to the disputed amount being agricultural income

and any observation in the first subject made in that order must be regarded as mere *obiter*. Ultimately both parties agreed that the question which has been referred to us should be answered and the Tribunal should be left to decide hereafter whether notwithstanding our answer the assessee is to be exempted from taxation.

[7] Now, in answering the question I must proceed on the assumption that the assessee is joint with Maharaja Ramchandra Deo to whom she has surrendered her estate, notwithstanding the fact that the evidence on that point does not seem to be quite complete. In 9 I. T. R. 695,¹ Sir George Rankin, after reviewing most of the earlier decisions of the Privy Council which dealt with the right of the junior member of a joint Hindu family to claim maintenance out of the income of an impartible estate, observed that the law as declared in 48 I. A. 195² and 59 I. A. 331³ has not been unsettled by 61 I. A. 286⁴. In view of this expression of opinion, it is necessary to refer to the following observations of Sir Dinshaw Mulla in 59 Cal. 1399⁵ at 1413:

[8] "The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in the Tipperah case in 3 Beng. L. R. 135 at p. 19: 'Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom'. Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in 10 All. 272⁶ and the *First Pittapur* case in 26 I. A. 83⁷ and so also the third as held in the *Second Pittapur* case in 41

1. ('41) 28 A. I. R. 1941 P. C. 120 : I.L.R. (1941) Kar. P. C. 155 : I. L. R. (1942) Lah. 1 : 68 I. A. 155 : 196 I.C. 707 : 1941-9 I.T.R. 695 (P.C.), Commissioner of Income-tax, Punjab v. Krishna Kishore.

2. ('21) 8 A. I. R. 1921 P. C. 62 : 43 All. 228 : 48 I. A. 195 : 60 I. C. 534 (P. C.), Baijnath Prasad Singh v. Tej Bali Singh.

3. ('32) 19 A. I. R. 1932 P. C. 216 : 59 Cal. 1399 : 59 I. A. 331 : 138 I. C. 861 (P. C.), Shiba Prasad Singh v. Prayag Kumari Debi.

4. ('34) 21 A. I. R. 1934 P. C. 157 : 56 All. 468 : 61 I. A. 286 : 150 I. C. 545 (P.C.), Collector of Gorakhpur v. Ram Sundar Lal.

5. ('69) 3 Beng. L. R. 13 : 12 M. I. A. 523 (P.C.), Nil Kristo Deb v. Birchandra Thakur.

6. ('88) 10 All. 272 : 15 I. A. 51 : 5 Sar. 139 (P.C.), Sartaj Kuari v. Deoraj Kuari.

7. ('99) 22 Mad. 383 : 26 I. A. 83 : 7 Sar. 481 (P. C.), Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards.

Mad. 778⁸. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property."

[9] In my opinion, therefore, the law on the subject has been correctly summed up in 12 I. T. R. 489⁹ in these words:

[10] "As regards the right of the widow to maintenance from the holder of an impartible estate it may be regarded as settled law that this rests on custom, and that such custom in the case of the younger sons at least has so often been judicially recognised as not to require proof. . ."

[11] It seems to me, however, that the discussion of the general question as to how far a widow is entitled as of right to maintenance out of the income of the impartible estate is not necessary in this case. It is common ground that the allowance which the assessee received in the year of account was paid to her under the deed of 28th June 1928. It was pointed out in 5 I. T. R. 569¹⁰ that the unfailing test for the applicability of S. 14 (1) is to determine whether the allowance would cease if the assessee ceased to be a member of the undivided family. See also 12 I. T. R. 489⁹. If we apply this test to the present case, the answer must necessarily be against the assessee. The assessee is entitled to a definite maintenance allowance under a registered deed and the deed does not say that she will receive this allowance only so long as she is a member of the Hindu undivided family. The law to be applied in the present case cannot, in my opinion, be different from that applied in 12 I. T. R. 489⁹ already cited where the assessee was a lady belonging to the Jeypore family to which the present assessee is said to belong and was much more closely related to the holder of the estate than the assessee. The facts of that case were these: Upon the death of the assessee's husband a dispute arose between her and his successor over the title to the estate and certain house property. The dispute was settled by the execution of a deed of settlement and compromise. Under the deed the assessee acknowledged the absolute title of the Raja in the estate and disclaimed, relinquished and conveyed in favour of the Raja whatever rights she might have had in

the properties and Raja on his part agreed that he and his heirs should pay a sum of one Lakh of rupees every year for and on her behalf and the same was to be secured by a charge on the estate. The Raja also agreed to pay her a certain sum for providing her with a suitable residence and for her medical treatment. The assessee claimed that the annual allowance received by her under the deed was exempt from taxation under S. 14 (1), Income-tax Act. This claim was, however, negatived.

[12] In the present case it is not at all clear that the assessee has received the allowance as a member of a Hindu undivided family. There is nothing to show that she used to receive any allowance before she executed the deed and there is no statement in the deed that the allowance was to be paid to her as a member of a Hindu undivided family. It is to be observed incidentally that the sum which was fixed as allowance was made the first charge on the Madgole estate and not on the Jeypore estate. If the Maharaja was liable to pay her an allowance apart from the deed and because of her being a member of a Hindu undivided family, the allowance might have been made a charge on the Jeypore estate.

[13] Reference may also be made here to 24 C. W. N. 226¹¹ which is also a case relating to the Jeypore estate and which is often referred to as "the Jeypore case". The head-note of that case runs as follows:

[14] "In a suit for maintenance by a brother's son of the late Maharajah of Jeypore out of impartible estate of which the latter was and the present Maharaja is now the holder, the defence assumed that the plaintiff had *prima facie* the right to be maintained but pleaded a special custom taking away such a right. The Courts below being of opinion that the defence had failed to prove the alleged custom decreed the suit. It was held by the Privy Council that in view of the decision in 45 I. A. 148⁸ the burden was on the plaintiff to prove a custom entitling him to maintenance and not upon the defendants to prove a custom negating the ordinary law. Apart from custom and from certain near relationships to the holder the junior members of the family of Zamindars entitled to an impartible Zamindari have no right of maintenance out of it, and there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right".

[15] It is said that the law laid down in this case has been unsettled by certain subsequent decisions of the Privy Council; but such an argument is no longer tenable. (See 9 I. T. R. 695¹ Supra). However that may

8. ('18) 5 A. I. R. 1918 P. C. 81 : 41 Mad. 778 : 45 I. A. 148 : 47 I. C. 354 (P. C.), Gangadhar Rama Rao v. Raja of Pittapur.

9. ('45) 32 A. I. R. 1945 Oudh 55 : 1944-12 I. T. R. 489, Laxmipat Mahadevi v. Commissioner of Income-tax U. P., C. P. & Berar.

10. ('37) 24 A. I. R. 1937 Lah. 905 : I. L. R. (1938) Lah. 47 : 175 I. C. 739 : 5 I. T. R. 569, Kartar Singh v. Commr. of Income-tax, Punjab.

11. ('19) 6 A. I. R. 1919 P. C. 126 : 52 I. C. 333 : 24 C. W. N. 226 (P. C.), Maharajah of Jeypore v. Vikrama Deo Garu.

be, there can be no doubt that at the time when the assessee entered into an agreement with the Maharaja in 1928 the view expressed in the Jeypore case was the prevailing view and upon that view the assessee was not entitled to maintenance apart from custom, from the holder of the Jeypore estate. It may be that for that very reason she chose to secure a maintenance allowance for herself by means of a formal deed of agreement and if she chose to enter into an agreement with the Maharaja which made it incumbent upon him to pay certain allowances to her, apart from her position in the family, it cannot be said that she received those allowances as a member of the Hindu undivided family. Reliance was placed by the learned Counsel for the assessee upon the decision of this Court in 24 Pat. 159¹² and that of the Oudh Chief Court in 8 I.T.R. 607¹³. These cases, in my opinion, can be of no help to the assessee. In the first case it was held that a certain maintenance allowance which the mother of a holder of an impartible estate periodically and regularly received from the estate in the hands of her son is exempt from taxation under S. 14 (1) and in support of this view reference was made to the following passage which was quoted from Mulla's Hindu Law:

[16] "A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal in character and arises from the very existence of the relation between the parties."

[17] If in the present case the assessee belonged to the category of persons referred to in the passage quoted from Mulla's Hindu Law, the position might have been different, but the pedigrees referred to in the order of the Tribunal show that she is very remotely related to the Maharaja of Jeypore from whom she received the maintenance allowance in question. The case in 8 I.T.R. 607¹³ is also distinguishable precisely on the same ground because in that case also the assessee was the mother of the holder of the estate.

[18] For these reasons, I would hold that the sum of Rs. 19,800 received by the assessee from the Maharaja of Jeypore is not

exempt from income-tax under S. 14 (1), Income-tax Act, and the answer to the first question should be in negative.

[19] The assessee must pay Rs. 250 as costs to the Commissioner.

Manohar Lall, J.—I agree.

D.R./D.H.

Reference answered.

A. I. R. (33) 1946 Patna 447 [C. N. 153]

MEREDITH AND RAY JJ.

Tikait Nagendra Nath Sahi and another—Appellant v. Bhagwati Prasad Narayan Sahi and others.—Respondents.

Appeals Nos. 44 and 46 of 1942, Decided on 19th December 1945, from Original Decrees of Dist. Judge Shahabad, D/- 16th January 1942.

(a) Land Acquisition Act (1894), S. 23 — Acquisition of land—Market value—Principles of determination.

In determining the market value of land, the land cannot be valued with reference to its present use or with reference to the present income derivable from it by the owner thereof. The potentiality of land is to be taken into consideration and regard must be had to the number of persons who are capable of turning the potentialities to account. The desire of the person at whose instance the acquisition is being made, to purchase the land to the exclusion of others may also be taken into account. ('39) 26 A.I.R. 1939 P.C. 98 *Followed*.

[P 452 C 2; P 453 C 1]

(b) Grant—Construction—Ancient deed or grant—Words not clear or unambiguous—Interpretation by contemporaneous usage.

Where the words of a grant are clear, certain and unambiguous, they would be interpreted in their plain ordinary grammatical meaning and consideration of any extraneous matter or evidence would be completely irrelevant. But when the words are not clear or unambiguous extrinsic evidence is relevant and should be had recourse to for the purpose of construing the deed. [P 455 C 1,2]

In the case of ancient deed whose words are not clear or unambiguous, evidence is admissible as to the interpretation placed upon ancient documents by persons who lived at the time of the execution of the documents or at a time not remote from its execution. This is known as contemporaneous interpretation or interpretation by contemporaneous usage. Thus documentary or oral evidence of contemporaneous usage throwing light upon the subject of the grant or its ambit is admissible. *Case law discussed*. [P 455 C 2]

(c) Land Acquisition Act (1894), S. 18—Dispute as to apportionment between Zamindar and three mukarraridars—Zamindar and one Mukarraridar applying for reference within time—Reference made—Court has power to determine claims of other mukarraridars also.

There was a dispute as to the apportionment of compensation between a Zamindar and three mukarraridars. The Zamindar and one mukarraridar applied within time to make a reference under S. 18, but the application of the other two mukarraridars was barred by time under S. 18, Proviso (a). On reference, the District Judge determined the claims of all the parties. In appeal to High Court it was contended that the claims of the

12. ('45) 32 A. I. R. 1945 Pat. 205 : 24 Pat. 159 : 221 I. C. 210, Commissioner of Income-tax B. & O. v. Gyanmanjari Kuari.

13. ('41) 28 A. I. R. 1941 Oudh 22 : 16 Luck. 159 : 190 I. C. 435 : 1940-8 I. T. R. 607, Commissioner of Income-tax C. P. and U. P. v. Rani Rudh Kumari.

other two mukarraridars were barred as they did not apply within time for a reference :

Held that the application of the Zamindar and one Mukarraridar necessitated a reference under S. 18 and the Court having seisin of the reference was empowered under S. 20 to direct appearance before it of all persons interested either in supporting or opposing the applicant for reference. The Court therefore had power, irrespective of any reference at the instance of these two mukarraridars, to investigate their claims. Their claims or the valuation of their interest could not be lost sight of or left undetermined in valuing the interest of the co-sharer mukarraridar who had applied for a reference within time. [P 459 C 2]

(d) Land Acquisition Act (1894), S. 20 cl. (b)—Persons interested—Meaning of.

The term 'interested' in cl. (b) is wide enough to include both the persons interested in supporting or opposing the applicant; that means that cl. (b) must have reference to parties having conflicting claims to the compensation either whole or part, as against the applicant. [P 459 C 2]

P. R. Das, C. P. Sinha, A. B. Saran and R. S. Lal (in No. 44) and Government Pleader, Standing Counsel and Syed Akhtar Hussain (in No. 46)—for Appellants.

Dr. Katju, D. N. Varma, Raj Kishore Prasad, Syed Hussain, Standing Counsel, Manzoor Alam and Chandrashekhhar Prasad (in No. 44) and D. N. Varma, C. P. Sinha, Raj Kishore Prasad, Manzoor Alam and Chandrasekhhar Prasad (in No. 46)

— for Respondent.

Ray J.—The questions which we have to deal with, in these appeals, arise in connection with a land acquisition proceeding, case No. 10 of 1937-38, in the district of Shahabad. The Provincial Government of Bihar made a declaration No. 5185R/II-7, dated 11th November 1937, for acquiring certain lands for Sone Valley Portland Cement Co. Ltd., for the purpose of the Company's constructing an aerial ropeway, car roads, godowns for stacking limestone and other incidental purposes. The declaration was in respect, inter alia, of plot No. 3 of village Jaintipur, plots Nos. 1 and 22 of village Nimhat, and plot No. 2 of village Deodand comprised within Taluqa Khandaul. The claimants for compensation before the land acquisition Collector were the zamindar of Taluqa Khandaul, namely, the Raja of Sonapura who is the appellant in F. A. No. 44, and three mukarraridars, namely, (1) Babu Bhagwati Prasad Narain Singh, who owns mukarrari interest of village Deodand entire and a moiety of village Nimhat, (2) Babu Onkarnath Dube owning 8 as. 10 pies interest in village Jaintipur, and (3) Babu Bishwanath Dube, owning an interest of 2 as. in village Nimhat. The land acquisition Collector, by his award on 19th October 1938, valued the lands at the rate of Rs. 64 per acre, and held that Nagen-

dranath Sahi, the proprietor, appellant in F. A. No. 44, was entitled to the entire value of the said lands. He disallowed the claims of the mukarraridars.

[2] Being dissatisfied with this award, all the aforesaid claimants filed applications under S. 18, Land Acquisition Act calling upon the Collector to make a reference to the Court. The Sonapura Court of Wards Estate, then representing the minor proprietor Nagendranath Sahi, raised the question of inadequacy of valuation in his petition for reference, while Bhagwati Prasad Narain Singh, besides raising the same question, also complained against the Collector's finding that his rights in the village were only confined to culturable lands, and that, therefore, he was not entitled to any part of the compensation representing the value of the lands which were on the slopes of the Hills. The other two mukarraridars, Onkarnath and Bishwanath, also raised the same objection as Bhagwati Prasad Narain Singh. In both these petitions, the mukarraridars contended that according to the mukarrari kabuliats, the mukarraridars were entitled to all sorts of rights including the sub-soil rights of the villages excepting the right to bamboos, timber and banker in one case and to bamboos and timber in the other, and that the proprietor, in the circumstances, was entitled to no part of the compensation.

[3] The questions raised in the aforesaid petitions for reference were duly referred to the District Judge of Shahabad who, by his order dated 16th January 1942, came to a finding that the Sonapura estate was entitled only to the capitalised value of the mukarrari rent and the annual revenue realised as royalty from the jungle, and the mukarraridars were entitled to the balance of the compensation amount. Considering the mukarrari kabuliats, as he did, he held that the mukarraridars possessed the surface rights over the hill and jungle areas of the villages—the present proceedings being only in respect of such surface right. He also relied on the survey entries as also the *tanaza* disputes (Exts. 3, 7, 17, 1 to 6 and 16).

[4] Against this order of the learned District Judge, the aforesaid two appeals have been preferred, appeal No. 44 by the Sonapura Raj in which all the mukarraridars and the Province of Bihar have been impleaded as respondents, and appeal No. 46 by the Province of Bihar impleading all the claimants-objectors as respondents.

The Collector in his appeal, disputes the correctness of the valuation made by the District Judge, and urges that the valuation fixed by the land acquisition Collector was the correct valuation, and the award should have been made accordingly.

[5] The subject-matter of Appeal No. 44 is the question of apportionment of the compensation, as between the proprietor and the mukarraridars.

[6] These appeals were consolidated and heard analogously. As the subject-matter of Appeal No. 46 is the amount of compensation, it would be more convenient to deal with that question first.

[7] Mr. Mehdi Imam, who appears for the appellant, contends that there are two sets of documents on the record, which he classifies as class A and class B, and that class A documents which were relied upon by the Collector represent the correct valuation of the lands, namely the rate of Rs. 64 per acre, while the learned District Judge relying upon class B documents, arrived at a figure of Rs. 176 per acre which, according to him, is wrong.

[8] Class B documents are Exts. O, 35 and 11. Exhibit O, dated 23rd March 1934, is an agreement signed by the Manager, Bhagwati Wards Estate (representing Babu Bhagwati Prasad Narain Singh, mukarraridar), the Manager, Sonapura Wards and Encumbered Estate (representing Nagendra-nath Sahi), Bishwanath Dube, Nagendra-nath Dube, Onkarnath Dube and others agreeing to settle with the Company any of their lands for transport of limestone, for any works in connection with the manufacture of any products therefrom, for building upon or depositing overburden and rejected stones or for any other purpose for which the Company may require, *at a nazrana of Rs. 16 reserving an annual rent of Rs. 8, per acre.*

[9] Exhibit 35 is a similar agreement of the same date by one mukarraridar.

[10] Exhibit 11 is a permanent mukarrari lease by Jugal Kishore Ram Dube and others to Sone Valley Portland Cement Co. Ltd., dated 22nd December 1934, by which Onkarnath Dubey and others had demised 25.71 acres of land at a premium of Rs. 8638.5.6 at the rate of Rs. 210 per bigha, reserving an annual rent of 4 as. per bigha, and the lease is to enure so long as the Company continues to carry on their business. The lands so demised are in village Gursote.

[11] It is true that the learned District Judge arrives at the valuation assessed by him, relying on Exts. O and 35 read with Ext. 1-A. Exhibit 1-A is a letter from the Manager of the Company to the land acquisition Collector, Shahabad, on 22nd February 1937. In this letter the Manager by way of explaining Ext. O says:

[12] "With further expansion of the cement work it was found necessary to take leases of further quarries to the west and also a strip of land for road and ropeway for transporting limestones. The mukarraridars were called including the Manager, Bhagwati Wards Estate and the General Manager, Sonapura Wards Estate, he being the proprietor of these mukarrari villages. It is necessary to mention here that the Company were under the impression that they will enjoy the same surface rights over the planes adjoining the foot of the hills as their predecessors-in-interest who had placed a number of pillars, which they were assured, were the boundaries of their demise. So the Company thought and were justified in thinking that they would require only a small additional area to serve their purpose. It was then settled in a meeting in which Manager, Bhagwati Estate and Manager, Sonapura Estate and some principal mukarraridars were present, that the Company should pay for their road and ropeway lands at Rs. 16 as salami per acre and Rs. 8 as rent per acre per annum".

[13] It is further said that accordingly a draft promise (referring to Ext. O) was drawn up by both the Managers and the mukarraridars present on 23rd March 1934. But later on, the mukarraridars failed to get the lease executed by all and the negotiation fell through. Later, however, the Government took interest in the venture of the Company. There was then a re-survey of the lands, and it was found that the Company's sub-lease terminating at the base of the exposed limestone, gave them no right over any of the adjoining lands; thus the need for more additional lands arose, and in view of the fact that the mukarraridars failed to keep their promise, the Company decided to obtain lands by land acquisition proceedings.

[14] With regard to Ext. 11, the Manager of the Company, in his aforesaid letter, admitted that formerly when they were in urgent need of lands near their quarry near Gursote, without which their work had come to a standstill, Martin & Co., their managing agents, under the aforesaid compelling circumstances, had been bound to pay salami at the rate of Rs. 200 per bigha reserving an annual rent of 4 as. in the year 1921, and later, when additional lands were required adjoining the aforesaid lands, by the time that a small village and a market had been established near them, the lands

had become more valuable, the Company "did not grudge to pay an additional sum of Rs. 10 as compensation per bigha" over the above Rs. 200, the price already paid as above.

[15] The letter Ext. 1-A then makes out two points: (1) that the terms of agreement of Ext. C had been accepted by the Company not under any pressing necessity but *because the area proposed to be acquired was small*; and (2) that Rs. 210 per bigha for Gursote lands was considered proper because at the time (of Ext. 11) the lands had become valuable on account of its proximity to a market and a village and also because a precedent for such a high value had been created by Messrs. Martin & Co., under pressing necessity of their business.

[16] The learned District Judge, relying upon these documents, and making allowance for the distance of six miles between Gursote lands and the lands under acquisition, has fixed the valuation at Rs. 176 which, in fact, is the capitalised value of what was agreed to be paid, for a permanent lease as per Ext. O between the Company and the parties concerned. The learned District Judge, in accepting the value, as evidenced in these documents as the proper value, observes that these documents indicate the value that would be paid by a willing purchaser to a willing vendor of the land with its potentiality.

[17] Mr. Mehdi Imam contends that this is not really so; that in both these cases, it was compelling necessity of which advantage had been taken by the vendors, and under which the purchaser agreed to pay, not willingly but under an abnormal circumstance or pressure of their demand for it. The submission, therefore, is that the evidence of price furnished by these documents should not be considered as proof of the standard.

[18] He, however, relies on the documents of class A which, according to him, consist of Exts. F series, C, C (1), B and B (1). Ext. F is a deed of sale, by Ram Raj Singh to Faquir Muhammad, in the year 1931, of 3 pies English share in mauza Nimhat, and 10 pies out of 1 anna 4 pies English share in mauza Deodand for a consideration of Rs. 900, the annual Mukarrari jama of the vended properties being Rs. 8-4-0. Exhibit F(1) is another sale deed of the year 1933, in favour of Faquir Muhammad, in respect of 3 pies share of village Nimhat, and 3 pies share of village Deodand, for a consideration of Rs. 700, the annual jama of the vended proper-

ties being Rs. 5-2-0. Exhibit F (2) is another sale deed in favour of Fakir Muhammad in the year 1934 in respect of 6 pies share of village Nimhat and 6 pies share of village Deodand for a consideration of Rs. 100. Exhibit F (3) is a sale deed of 1934 in favour of Fakir Muhammad in respect of 3 pies in khewat No. 13 and 11 pies in khewat No. 14 of village Nimhat, and 11 pies each in khewats 12 and 13 of village Deodand for a consideration of Rs. 100. The learned Counsel handed over a statement to us, in course of argument, for the purpose of demonstrating that calculating, in terms of the area of the land sold in the aforesaid sale deeds, the price of lands per acre comes to Rs. 29 in Ext. F, Rs. 43-12-0 in Ext. F(1), Rs. 8 in Ext. F (2) and Rs. 20 in Ext. F (3). The figures given, in that statement, do not appear either from the aforesaid sale deeds or from any other document on the record. It is difficult, therefore, to rely upon these statements for the purpose of arriving at any conclusion as to the price of lands sold therein. But it is obvious, however, that the price obtained in Ext. F is nearly 109 times and that in Ext. F (1) is 125 times of the annual jama of the properties sold therein. The other two sale deeds do not mention the annual jama of the vended shares. In none of these documents, the area equivalent to the shares sold is given. In relying upon Ext. C series, he invites our attention to the low annual rental payable by the cultivating raiyats of the villages in question. Exhibit C, the cess valuation of village Deodand shows that the average rate of the cultivating raiyati lands of the village is 13 As. per acre, while that for Jaintipur is Rs. 1-13-9 and the Collector fixes rental value for village Deodand, for homestead lands of 33 acre, at Rs. 53 and the rental for banker lands at the rate of 5 As., per acre. In village Jaintipur the Collector values the annual rent at Rs. 1914 for an area of 1214 acres. On the other hand, these cess valuation papers are relied upon by the respondents, to show that the lands in Deodand and Jaintipur are of superior quality to those of Gursote because Ext. 27, the cess valuation paper of Gursote shows that banker lands are assessable at 4 As. per acre while similar lands of Deodand are assessable at 5 annas per acre. In my judgment, however, none of these documents help us to come to a decision.

[19] Next reliance is placed upon Exts. B and B (1) which are leases by the Government to the Company, of lands on Rohtas hill for the purpose of manufacture of lime-

stone and cement. In those leases the ground rent reserved is Re. 1 per acre subject to maximum rental of Rs. 100, and the learned Counsel argues that 25 times the annual rent bring the price to Rs. 25 only per acre. The comment of the learned Counsel for the respondents, which I think is a correct one, is that the document, read as a whole, shows that the Government was thereby entitled to get an annual minimum royalty of Rs. 5000 in addition to the ground rent, and therefore the rate of ground rent reserved cannot be taken as a standard either of ground rent or for value of lands.

[20] I have said before, that in Exts. F and F (1) the prices secured for the lands sold represent 109 times in one case and 125 times in another of the annual rent. Calculating by that rate and taking one rupee per acre as annual rent for the lands under acquisition on the basis afforded by Exts. B and B(1), it would not be unfair to say that the price should be between 109 to 125 times per acre, and as Exts. B and B (1) are very much relied upon by the appellant and as I arrive at this figure by calculating at the rate of Exts. F and F (1), the appellant can possibly have no reply. There may or may not be a fallacy in this my calculation because a purchaser pays so many times annual jama of the property according as it is commensurate with a margin of profit left to him out of his collections from the undertenants. But at the same time it cannot be overlooked that the profits derivable from land used for an industrial concern do not compare very unfavourably with those from agricultural operations. In this view of the matter, I may not be far from correct in arriving at the standard by the aforesaid method of computation, but I am not willing to place much reliance over this unless I am re-inforced by certain other facts grounded on a firmer basis.

[21] Before coming to a conclusion on the point, I shall address myself to the principles that should guide a court in such a matter. Section 15 of the Land Acquisition Act proves that determination of the amount of compensation shall be governed by the provisions contained in sections 23 and 24 of the Act. Section 23 provides, inter alia, that the compensation shall include the market value of the land at the date of the publication of the notification, the damage sustained by reason of the taking of any standing crops or trees on the land, damages sustained by reason of the acqui-

sition injuriously affecting other property and a sum of fifteen per centum on such market value in consideration of the compulsory nature of the acquisition. In the present case, there does not arise any other kind of damage except value of trees which has been taken into consideration by the Court below; and I do not propose to interfere with his finding on this count. The only question which is not free from difficulty is ascertaining the yardstick with which the market value of the land in question should be measured.

[22] Though the documents such as Exts., O and 11 in a different context would furnish a sure basis for ascertainment of the market-value, the efficacy of their evidentiary value is challenged by the learned Counsel for the Collector, on the ground that the circumstance of compulsion environs them. He, therefore, calls our attention to the documents relied upon by the Collector which, as I have shown above, on proper analysis, provide no guide whatsoever. It may be noted here that no such circumstance of compulsion is alleged to have affected the transactions evidenced by Exts. B and B(1) which I have dealt with previously and shall come to deal with them again later. It is also far from correct to say that Ext. 11 is subject to the criticism of compulsion. I am inclined to omit Ext. O from consideration for the reason that they were then proposing to take a small extent of land. The learned Counsel in support of his proposition relies upon the case in A. I. R. 1939 P. C. 98¹. It would be profitable to quote here certain passages from the aforesaid decision in which the word "market-value" occurring in s. 23 (1) (i) has been interpreted. Their Lordships observed:

"It is perhaps desirable in this connexion to say something about this expression 'the market price.' There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value' in section 23. But sometimes it happens that the land to be valued possesses some unusual and it may be, unique features as regards its position for its potentialities. In such a case the arbitrator in determining its value will have no

1. ('39) 26 A.I.R. 1939 P. C. 98; I.L.R. (1939) Mad. 532 : I. L. R. (1939) Kar. P. C. 167 : 66 I. A. 104 : 181 I. C. 230 (P.C.), Narayana Gajapati-
raju v. Revenue Divisional Officer, Vizagapatam,

market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined that time under the Indian Act being the date of the notification under S. 4 (1), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain however that the land must not be valued as though it had already been built upon, a proposition that is embodied in section 24 (5), of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realised possibilities that must be taken into consideration" (at page 102, col. 2).

[23] While dealing with the practical side of what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities, their Lordships said:

"The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This however is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its 'market value'. But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at 'the market price', to use the words of S. 23 of the Indian Act".

[24] In laying down the principles for ascertaining the value of lands with reference to their potentialities or possibilities their Lordships said:

[25] "In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this

judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time. In the case however of land possessing potentialities of such an unusual nature that the arbitrator has not similar cases to guide him, the value of the land must be ascertained in some other way. In such a case moreover there will in all probability be only a very limited number of persons capable of turning the potentialities of the land to account". (P. 102 col. 2)

[26] Their Lordships have in their judgment deprecated a standard to be derived by the method of an imaginary auction. (p. 103, col. 1)

[27] With a view to dispel any doubt as to the method of ascertaining potentiality of any particular land and in clarifying the position as to how far it is a compulsion on the part of the intending purchaser on account of the vicinity, or other circumstances of like nature of the land, in question, to his other property, in the interest of which the acquisition is needed, it will not be out of place to quote from the judgment what I should call an apt illustration given by their Lordships, in order to demonstrate how the market value of the property to be acquired might be affected in particular circumstances. In this connection their Lordships observed:

[28] "There was a house of which the value to any one except certain trustees was no more than £750. These trustees were the owners of a nurses' home which adjoined the house, and they were desirous of extending their premises. They accordingly purchased the house for £1000, the owner thus receiving £250 for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by the Court of appeal that £1000 was the value of the house to a willing seller. 'To say', said Lord Cozens-Hardy M. R. 'that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay, a large price, but *solely with reference to its ordinary agricultural value*, seems to me absurd.' Had the house in that case been acquired compulsorily by a railway company, or local authority under the provisions of the Lands Clauses Consolidation Act, 1845, before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at £1000 and not merely at £750."

[29] Applying the principles laid down by the Judicial Committee as aforesaid, the position, in this case reduces itself to this, namely, that you cannot value the land with reference to its present use, or, in other words, with reference to the

income that is at present derivable from it by the owner thereof; that in assessing the market value you have to take into consideration the potentiality of the land derived from its proximity to the quarries of the Company; in considering this potentiality you have to keep in view that there are not many other persons than this Company who can realise its possibilities; that you cannot at the same time disregard the fact that the Company might desire to purchase the land more than others, that is, Company's desire to purchase though not under compulsion may always be taken into consideration for what it is worth.

[30] Bearing this in view, I do not think that the evidence afforded by Exts. F series and C series is of any assistance in ascertaining the market price. But, on the other hand, Exts. 11, B and B (1) are of considerable assistance in this matter, but while basing our conclusion on these latter documents, allowances should have to be made to the circumstances under which those transactions were entered into and to the position and character of the lands acquired under them.

[31] Exhibits B and B (1) are transactions of a very recent date, being of the year 1936. Secondly, those transactions, it is not disputed, are transactions between willing parties, there being no element of compulsion present. It has, however, to be borne in mind that those are leases not only of the surface right but also of the mining rights in the land. The value of the mining rights is represented by the minimum annual royalty fixed therein while the value of the surface right is represented by the annual rent reserved. With regard to Ex. 11, no compulsion is attributed by the manager of the Company in his letter Ex. 1-A, but what he says is that the precedent that was adopted by the Company in entering into this transaction was already there created under compelling circumstances by Martin & Co. But one fails to understand, if the Company did appreciate that the precedent created by Martin & Co. was a bad one, that they should have agreed voluntarily to enhance the value by Rs. 10 per bigha. In Ex. 11 which is a lease and not a deed of sale out and out, the premium per bigha is Rs. 210 with reservation of an annual rent of 4 as. per acre which has been rightly assessed at Rs. 336 per acre by Moti Singh, vide Exs. 1 (b) and 1(c), while in leases Exs. B and B(1) the surface right of the land is leased at an

annual rent of Re. 1 per acre. The present is different from these transactions in the sense that it is a sale out and out. The lands demised under those documents, though at some distance from the lands under acquisition, are not dissimilar and the lands stated in Exts. B and B(1) are in mahal Rehal which is just to the north of the lands in question. Possibility or potentiality is the same in the case of Ex. 11 as in the case under consideration, because they are very near the extended quarry operations of the Company, and, therefore, at the date of declaration, they stood a fair chance of being acquired by the Company, for their very useful purposes connected with their manufacture of lime or cement. In these circumstances, I should say that I am reinforced in my view of fixing the market value at the rate of Rs. 110 per acre as was roughly deducible from Exts. F and F(1) dealt with above. This is nearly one-third of the price paid under Ex. 11 by the Company at a near about date. Exhibits F (2) and F (3) seem to be, in contrast with Exs. F and F(1), but they are documents brought into existence by the Company through one of their agents Fakir Muhammad Khan at a time when the Company's need for acquisition was very imminent. These documents have been attacked on this ground by the respondents and the validity of this attack has also found favour with the learned Court below. I have no hesitation in ruling out these two documents as of no evidentiary value for the purpose in hand.

[32] In my judgment, therefore, the valuation, as herein proposed by me, namely, Rs. 110 per acre plus a statutory compensation of 15 per cent is, if it is an error at all, on the side of leniency towards the purchaser. Had the proposed acquisition been placed on a slightly different context with regard to the position of the lands it should not have been unreasonable to value at the rate of more than Rs. 210 per bigha. But as the lands sold at that rate are at a distance of six miles from the lands in question, it will be unreasonable to bodily accept it. I would therefore modify the decree of the learned District Judge to the extent indicated above.

[33] I have forgotten to mention that reliance was also placed on Ex. 23 by the appellant in support of this contention that the terms of his document work out the value to be Rs. 72 per acre, but it has been rightly pointed out by the respondents that

this is a lease for 15 years only and is in respect of lands passing along ahars (*sic*) for constructing a road. Therefore, it is not relevant.

[34] I shall now proceed to deal with the Appeal No. 46. This appeal relates to the apportionment of compensation between the zamindar Nagendranath Sahi, appellant on one side, and the respondent mokarraridars on the other. The position maintained by the latter is that under kabuliats Exs. 24 and 1-3, they being permanent mukarraridars of the lands in question subject to the proprietor's right to levy some fees for bamboos and timbers exported for the purpose of trade, they are entitled to the whole of the compensation money. The appellant's case is that the leases were agricultural leases, in respect of arable lands of the villages, subject to baskati rights excepted from the demise, and reserved for the benefit of the proprietor, and that the disputed lands being on the slopes of Rohtas hills, they were not demised at all and hence the mokarraridars have no right to the compensation.

[35] The lease (Ex. 24) is in respect of mauzas Nimhat and Deodand Asli and Ex. 1-3 is in respect of half of mauza Jaintipur. Exhibit 24 is in the following terms:

[36] "We have taken perpetual istimrari mugarrari descendible to children generation after generation both in the male and female lines of the said entire mauza appertaining to taluqa Khandaul pargana Haveli Rohtas district Shahabad together with all habub (grains) at an annual jama of Rs. 307/8/- in kaldar sikka coins consolidated from all sources, save and except timber bamboos and banker with effect from 1236 Fasli on the same being granted by the Maharaja Saheb-Maharaja Damar Nath Sahi, owner, proprietor and mugarraridar of taluqa Khandaul, pargana Belanjar and filed the qabuliat before the hazur of our free will and accord (undertaking) to deposit (the rent) instalment after instalment crop after crop in accordance with the details given below into the treasury of the Sarkar and we shall not put forward any plea and objection. We have therefore put into writing these few words by way of a qabuliat so that they may be of our use when required.

Rs. 307/8/-

Kharif (Autumn). Rs. 205/-/-

Rabbi (Spring) . . . Rs. 102/8/-

[37] Exhibit 1-3 is in the following terms:

[38] "Kabuliyat executed by Mahanth Injor Singh, Raghubir Singh and Bhairo Dayal. We have executed an istimrari mukarrari kabuliyat descendible to children in both male and female lines generation after generation in respect of mauza Jaintipurnisf and the entire village Chanseani in talluq Khandaul Kila, etc., otherwise known as Belanja, Sarkar Rohitas, district Shahabad, pargana Haveli (at a jama of) Rs. 18/12/- (Rupees eighteen and annas twelve in the Imperial sikka

coins in favour of Sri Maharaj Damar Nath Sahi, malik mukarraridar, of our own accord and sweet will. We shall cultivate the same peacefully and appropriate the produce thereof and pay the rent according to the terms of the mukarrari year after year, crop after crop, instalment after instalment without any plea on the ground of calamity and without objection into the treasury of the Sarkar, with the exception of bamboos and timber (for) trade, which will concern the Sarkar.

Jama in sikka coins, . . .

Rs. 18/ 12/-

Autumn. . . .

Rs. 12/ 8/-

Spring . . .

6/4/-

Date 11th Agahan 1241 Fasli".

[39] In view of the contentions of the parties the following questions arise for consideration, (1) whether the villages demised included the hills and the hill slopes and (2) whether what is excepted from the subject of demise are rights to bamboos, timber and banker in Ex. 24 and bamboos and timber in Ex. 1-3 or the entirety of what is known as baskati mahals rights.

[40] Along with Ex. 24 was executed by the mokarraridar lessees an agreement on the same date, which is to the effect that the mokarraridars shall have no concern with the ground rent and parjota (quit rent in ground rent of houses) of any of the tenants of the proprietor who are at present settled in the villages or who may come from another village and settle in the villages and that the said ground rent or quit rent will be collected by the Raja. In respect of the other half of village Jaintipur another lease was granted by the proprietor (Ex. 25, dated 19.5.1937) which is to the effect that the lessees will have permanent heritable mokarrari istimrari right in the village which they should cultivate and appropriate the proceeds thereof and pay rent year after year, harvest after harvest, instalment after instalment, to the lessor. Bamboos and timber shall be excepted and be held by the Sarkar (proprietor). The rent reserved was Kharif harvest. Rs. 11, Rabi harvest Rs. 6, total Rs. 17.

[41] Learned Counsel who appears for the appellant-proprietor contends that the leases are only agricultural leases and the villages as mentioned therein were not the same as the present survey villages and the exception clause was but an infelicitous way of describing the baskati rights in their entirety.

[42] It is to be borne in mind that the earliest survey that was made in the area was the revenue survey in the years 1844-45,

which was probably followed by the thakbast survey. The latest survey was the cadastral survey followed by the preparation of the record-of-rights between the years 1912 to 1916. It is, therefore, obvious that the term "mauzas" or "villages" in the mokarrari leases has to be interpreted in the light of contemporaneous usage relating to land tenures of the tract of country to which they appertain, and similarly the exception clauses will have to be interpreted in the light of contemporaneous usage and subsequent conduct of the parties in relation to their dealings with the respective rights either derived from or reserved by the said grants.

[43] Before proceeding to examine the documents and review the history in so far as they have a bearing upon this single outstanding question of construction that have been invoked by the respective parties in support of their respective contentions (*sic*).

[44] Dr. Katju appearing for the respondents urged very strenuously that the words of the grant are clear, certain and unambiguous, and therefore they would be interpreted in their plain ordinary grammatical meaning and consideration of any extraneous matter or evidence would be completely irrelevant. No doubt, this rule of construction is a correct rule. It has, therefore, to be examined whether the expressions in the documents are clear and unambiguous.

[45] The leases in question do not mention the area nor the boundary of the lands leased, but they are expressed in terms of the village names. If villages had by then been defined by survey and settlement papers, or if any other public paper of the time were available with the help of which the villages would be defined both in respect of areas and boundaries, there would in fact be no ambiguity, and the question would not admit of solution by the help of extrinsic evidence. But as I have said, already, there is no such paper available. The respondents have not been able to adduce any contemporaneous evidence either oral or documentary in support of their contention.

[46] The same is the case with regard to the exception clauses. Exception is expressed in terms of bamboos and timbers. In my judgment, the exception should mean at least something more than mere bamboos and timbers. If the grant was in respect of some moveables, the exception clause expressed in the aforesaid terms would be quite plain in its meaning but in the case of a demise of immovable property, to except some movable such as bamboo and timber from the demise would

be meaningless, unless it is taken to mean some sort of right in the subject of demise relating to bamboo and timber. In my judgment, therefore, both the general expressions of the demise and the exception clauses contained in the leases in question are far from being clear, certain and unambiguous. In the circumstances indicated above extrinsic evidence is relevant and should be had recourse to, for the purpose of constructing these deeds.

[47] Mr. P. R. Das appearing for the appellant refers to, for the meaning of "Mauza", Wilson's Glossary, p. 531, where it is said to mean one or more clusters of habitations, and all the lands belonging to their proprietary inhabitants, and relied upon Norton on Deeds, pp. 154 and 157 and the cases in (1849) 3 Ex. 413; 154 E. R. 905² at p. 910, (1887) 20 Q. B. D. 263³ at p. 275, (1859) 7 H. L. C. 650 at p. 694; 11 E. R. 259⁴ at pp. 262 and 263.

[48] Norton at p. 154 says :

[49] "Evidence is admissible as to the interpretation placed upon ancient documents by persons who lived at, or at a time not remote from, the time of the execution of the document".

[50] This is known as contemporaneous interpretation or interpretation by contemporaneous usage. In this view of the matter either documentary or oral evidence of contemporaneous usage throwing light upon the subject of the grant and its ambit will be admissible.

[51] In (1849) 3 Ex. 413² the question arose whether an ancient grant of a manor of Gower included the sea shore between high and low water mark. The trial Judge told the jury :

[52] "you cannot define the seigniorship of Gower, merely from those words. You cannot say that the spot which the plaintiff claims is his, as being part of the seigniorship of Gower, merely from those words. But if by usage, which is of so long-standing, that we may presume it to be contemporaneous with the grant itself, the sea shore in question has always been considered to be part of the seigniorship of Gower, then you will take the grant and usage together, or, in the language of the learned Judge 'looking at all the evidence in the case', not the documentary evidence alone (which he expressly tells the jury does not necessarily carry the right of the Crown), but looking at the grant, coupled with the usage, you are to form your own opinion".

[53] Pollock, C. B. said :

2. (1849) 3 Ex. 413; 154 E. R. 905, *Duke of Beaufort v. Mayor of Swansea*.
3. (1887) 20 Q. B. D. 263; 57 L. J. Q. B. 189; 53 L. T. 392, *Duke of Devonshire v. Pattinson*.
4. (1859) 7 H. L. C. 650; 11 E. R. 259, *Right Hon. Lord Waterpark v. Joshua R. Fennell*.

[54] "I think that direction is perfectly correct and that, so far as it relates to this matter, the rule must be discharged".

[55] Barron Park agreeing with Pollock, C. B. said :

[56] "Unquestionably, if evidence may be given to show what was the boundary of the manor upon the sea side, the evidence here shows that, in point of fact, the manor in the hands of the Crown, and, possibly, in the hands of a subject before was actually bounded by the then line of demarcation, namely, the low water mark. All modern usage to that effect is evidenced to show what was the meaning of the grant. I have no doubt that all ancient documents, where a question arises as to what passed by a particular grant, can be explained by modern usage."

[57] In (1887) 20 Q. B. D. 263³ the question arose whether the fishery fronting a particular manor formed a parcel thereof. The Court said :

[58] "We do not know whether the fishery was at that date in the hands of the Duke or of a tenant; . . . but we know that for many years previous it had been let as a fishery, and we feel bound to presume that the modern user, which has been proved with regard to the fishery, existed in 1767, that the fishery was then as now known and treated as a tenement distinct from the closes adjoining the river: and the fact that the corporation had never, for more than a century after the grant of 1767, set up any title to fish under this deed, or exercised any such right, is a strong confirmation of our conclusion. 'All ancient documents', as was rightly said by Lord Wensleydale in (1849) 3 Exch. 413,² 'where a question arises as to what passed by a particular grant can be explained by modern usage'."

[59] In (1859) 11 E. R. 259⁴ their Lordships said :

[60] "The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor. In deeds, as well as wills, the state of the subject at the time of execution may always be inquired into; and as with respect to ancient deeds the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed. These deeds are to be construed by evidence of the manner in which the subject has been possessed or used".

[61] (1849) 3 Ex. 413² is relied upon. Then it is said :

[62] "Lord Hardwicke with reference to the construction of ancient grants and deeds, says there is no better way of construing them than by usage and contemporanea expositio is the best way to go by."

[63] Lord St. Leonards says :

[64] "One of the most settled rules of law is that you may resort to contemporaneous usage for the meaning of a deed. 'Tell me what you have done under such a deed and I will tell you what the deed means'".

[65] (His Lordship, then, observing that there was no oral evidence of contemporaneous usage discussed documentary evidence regarding such usage and came to the conclusion as follows.) In my judgment, the contemporaneous usage indicate exclusion of the Hill slopes from the "Mouzas" mentioned in the leases.

[66] Let us then address ourselves to the documents evidencing modern usage and showing how the parties acted under the deed (per Lord St. Leonards: "Tell me what you have done under such a deed and I will tell you what the deed means").

[67] (His Lordship then discussed documentary evidence bearing upon modern usage from which contemporaneous usage could be presumed and concluded.)

[68] Mr. P. R. Das relying upon this group, of exhibits of indenture argues, I think rightly that they prove that it is the Raja alone who was exercising acts of possession over the hill slopes from near the cliff down to its bottom, without any let or hindrance from the mokarraridars.

[69] It is argued in the alternative, that these will make out a case of title by adverse possession as against the mokarraridars, in case it is held that the hill slopes were included within the aforesaid grants in their favour. To this Dr. Katju representing Bhagwati Prasad Narain Sahi gives two replies: (1) that these documents only prove either possession of Baskati rights by the Raja on the hill slopes or (2) possession of mineral rights which include collecting lime-stone either from the surface or from beneath the surface. In his view therefore title to the surface of these lands which only is the subject-matter of the land acquisition proceedings is not in the least affected. Dr. Katju further argues that mere proof of grant of leases does not amount to proof of actual possession. Mr. P. R. Das in reply to this last argument of Dr. Katju invites our attention to a series of documents consisting of entries in the general ledger of the estate of Sonapura, entries in cash books of the lessees above-named and receipts by the Sonapura estate on various dues relating to this hill. (His Lordship then, after discussing this set of documentary evidence came to the conclusion that they did not afford any proof of exercise of acts of possession by the mokarraridars over the slope of the hills.)

[70] The position, therefore may be summarised like this. The hill slopes for the purpose of Baskati rights have admittedly

been in possession of the proprietor of Mahal Khandaul since the year 1813 or at least since 1847 up to date. In course of exercise of Baskati rights, quarries of lime-stones have been made, kilns have been constructed, buildings, roads, wells etc. have also been built for purposes incidental to the manufacture of lime and extraction of lime-stones. These operations whenever they have involved exercise of surface rights and interference with the grounds, they have been done without any reference to or without any let or hindrance by the mokarraridars. At least from the year 1920, if not earlier, the proprietor of the Sonepura Estate has been realising ground rent for the lands on the hill slopes whenever they have been taken possession of by his lessees in addition to the royalties for lime-stones and royalties for forest produce. The Portland Cement Co., after getting assignment of the lease granted in favour of Karuna Ranjan Dutt and Jugal Chandra Dutt have constructed various buildings, roads, car roads, ropeways and other kinds of structures by virtue of those leases and have had never to pay anything to the mokarraridars. This conduct on the part of the mokarraridars is only consistent with their having no sort of right whatsoever over the hill slope areas.

[71] This view is sufficiently re-inforced by the fact that in course of the last cadastral survey when there was a dispute between the Government as owner of the plateau villages and the Raja of Sonepura as owner of Mahal Khandaul with regard to whether these hill slopes will be included within the boundary of Government plateau or within the zamindari villages of Mahal Khandaul, the mokarraridars not only stood aside but made definite admissions that they had no claim to them and they filed petitions Exts. 1-22 dated 10th February 1912 and 1-43 dated about the same time (date not given in the document) before the Assistant Superintendent of Surveys agreeing that the revenue survey boundary may be relayed between villages, Nimhat, Jaintipur and Deodand on one side and Rohtas (Government village) on the other. At this point I may call attention to a very clear admission on the part of Onkarnath Dubey in this respect- vide Ext. E, dated 9-6-36. This is a plaint filed by Onkarnath Dube against Sone Valley Portland Cement Co., and others for specific performance of a contract of sale of the lands described therein and basing his cause of action on Ex. O. In para. 5 of the plaint he says that during the revisional cadastral

survey, dispute arose regarding the northern boundary of Jaintipur with village Shekhpura which is on the mountain and constitutes the Khas Mahal Estate of the Government between the Raja of Sonepura and the Government with the result that in the revenue survey map which was finally published, the hill slope was not shown in village Jaintipur. Then he says that ultimately by the judgment of the Commissioner dated 28th February 1916, it was held that the entire slope of the mountain lay within the ambit of village Jaintipur. Accordingly the said slopes had been shown by letters A, B, C, D, E, F, G, H, I, J and K in the sketch map attached to the plaint. This, in my view, is a clear admission that the disputed lands or at any rate the hill slopes lay in the revenue survey within the boundary of the Government village, and was never till the cadastral survey boundary considered by the mokarraridars to be a part of their morkarrari villages.

[72] From the above, it is perfectly clear to me that in the years of the leases 1828 to 1833 the term "mauzas" occurring therein was never conceived either by the grantor or by the grantee to include the hill slopes. To put another construction would be somewhat abnormal. There is no doubt that since at least 1847 the proprietor was granting leases of parts of the hill slopes for the purpose of manufacture of lime. I have shown that in the judgment of the High Court of Bengal in 1866 it was either assumed, or decided that between the Khandaul plain villages and the Rohtas plateau there intervened a property of the proprietor. All these converge to the only conclusion that this part was never included within the ambit of demise under the leases in question. In this view of the matter, the question of title by adverse possession does not arise. In case I was to decide it, I would be inclined to hold in favour of the appellant in view of the principles enunciated in 61 I.A. 78⁵ and (1837) E. R. 781⁶. The possession of the appellant has been exclusive, open and continuous and though it does not cover every moment and every inch of the lands, it is quite sufficient to make out a case of adverse possession from the nature of the property and from

5. (1934) 21 A.I.R. 1934 P. C. 23 : 61 Cal. 262 : 61 I.A. 78 : 147 I.C. 545 (P.C.), Secretary of State v. Debendra Lal Khan.

6. (1837) 6 L. J. Ex. 107 : 150 E. R. 781, Jones v. Williams.

its common character. But I don't decide it.

[73] The learned Counsel for the appellant has urged that according to the exception clause of the leases, the Banskati Mahal right was excluded from the grant and the Banskati Mahal right being the only source of whatever revenue is derivable from these hill slopes, exclusion of that amounts to exclusion of the hill slopes. In support of this, his contention, he relies upon a decision of this Court in 19 Pat. 433.⁷ In my view, the principles laid down there are not applicable to the facts of this case because there one of the clauses in the grant provided that :

"all the estate, right, title, interest, claim, and demand whatsoever of the assignors into, of, or upon the said one-eighth or two-annas share" had been assigned and another clause provided that the

"assignees shall and may at all times hereafter peaceably and quietly enjoy and receive the said share of the said salamis, and royalties, hereby assigned or intended so to be without any let, stay, eviction, interruption claim or demand whatsoever from or by the assignors or any person or persons lawfully claiming through them etc."

In the present case, the exception clause is not couched in terms so wide as that, but for reasons recorded above, I have no hesitation in holding that the hill slopes were not included in the leases concerned as they were not considered within the ambit of villages at the foot of the hill. At least they never extended beyond the Revenue Survey boundary of the villages of Kbandaul.

[74] In this view as to the interpretation of the leases in question, the reservation clauses such as except bamboo, timber and banker in Ext. 24 and except bamboo and timber for trade in Ext. 1-3 do not fall to be considered. Those exception clauses relate to the rights reserved for the benefit of the proprietor in the plain areas down below the foot of the hill which form the subject-matter of the leases aforesaid.

[75] The next question we have to consider is whether the lands under acquisition lie on the hill slopes or within the plain areas of the relevant villages. All the evidence oral and documentary, unmistakably indicates that they form part of the slopes of the hills. To start with the reference to the Court under S. 18, Land Acquisition Act, describes the condition and the capacity of the lands in terms of "hill tract and unfit for cultivation." In the proceedings under S. 11 of the Act the lands are described as "waste lands, jungle, pahar (hill) unfit

for cultivation purposes." The kanungo, Syed Mohammad Mazoor Rizvi, witness No. 1 for the Collector, a disinterested witness, swears "the area under acquisition is on slope of a hill. It is not correct that there is no slope of hill in the villages under acquisition," and says in another passage, "the lands under acquisition is rocky and unfit for cultivation." Witness No. 2 for the Collector, another kanungo, swears :

[76] "I made local inspection of the area under acquisition. The area under acquisition is waste land and unculturable. I did not find any crops on the lands".

Witness No. 1 for the applicant, Bhagwati Prasad Narain Singh, admits that the land in dispute is partly a hill slope. Ext. N, note of kanungo regarding acquisition of land dated 26th May 1938, states,

"The land under acquisition is recorded in the khatian as 'jungle-pahar'. It is rocky all over in quality and not fit for cultivation and even unfit for production of good bamboos and timber".

[77] In the khatian the lands are described as jungle and hills.

[78] In my opinion, therefore, the disputed lands are the slopes of the hill and the mokarraridars respondents have no sort of interest in them. I am in accord with the view of the land acquisition Collector that the whole of the compensation money should go to the appellant-zamindar.

[79] Mr. Hubback's Settlement Report makes it clear that in the cadastral survey the revenue survey line was not exactly followed. For this reason as well as for the reason that the cadastral survey boundary was set aside by the Commissioner, the cadastral survey boundary line can bear no presumptive value. The same Settlement Report also expresses doubt as to the correctness of the revenue survey boundary which too was found to be incorrect by the aforesaid judgment of the Commissioner. The revenue survey and the cadastral survey map, therefore, are not reliable in this connection.

[80] In this view of the matter the question of apportionment of compensation between the appellant and the respondents does not arise.

[81] Before closing I shall have to notice the contention raised by the appellant that the claims of Onkarnath and Bishwanath Dubey were barred as, under section 18 of the Land Acquisition Act, they did not apply for reference within the period of six weeks from the date of the award. The delay is not disputed by the learned Counsel for the Dubey. But he contends that the District

7. (40) 27 A.I.R. 1940 Pat. 516; 19 Pat. 433 : 192 I. C. 17, Jyoti Prasad Singh v. Samuel Henry Seddon.

Judge had no jurisdiction to entertain this plea, the Collector having decided to make the reference. Reliance is placed upon Sections 20 and 21 and it is urged that the Court shall have the power only to investigate the matter referred, and not the question if the Collector had acted rightly or wrongly in making the reference. In support of this contention Mr. D. N. Varma refers to the case in 52 All. 96⁸, which lays down that the Court to which reference is made under S. 18 of the Act has no jurisdiction to go behind the reference in order to scrutinise its regularity. This case is a direct authority on the point and supports Mr. Varma's contention fully. He also relies upon the case in A. I. R. 1943 Mad. 327⁹. In this case it is held that the Collector's order is final both when he makes a reference, and when he refuses to make a reference. The Land Acquisition Court cannot sit in appeal against his order. Mr. P.R. Das for the appellant urges that the Collector's jurisdiction to make a reference is derived from the Statute—in this case, S. 18, Land Acquisition Act, and it is a universal principle that he must comply with the specified terms on which the jurisdiction is given. One of the terms in S. 18 is set forth in the proviso in the following terms:

[82] "Provided that every such application shall be made (a) if any person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award".

[83] It is not disputed that Dubey's application for reference falls under (a) of the proviso, and that it is beyond time. He, therefore, contends that the Collector in making the reference in disregard of this mandatory provision of law, has acted without jurisdiction, and the claim of Dubey's should not have been entertained by the Court. He relies upon the case in A. I. R. 1944 Bom. 200¹⁰ in which Beaumont, C. J. (Rajadhyaksha, J. agreeing) disagreeing with the Allahabad view held that "it is the duty of the Court to see that the statutory conditions have been complied with". There is thus conflict of authority on the point, and the question is one fraught with difficulties. That point, however, does not need a decision, in view of the circumstances of the present case. In this case, two applications,

8. (29) 16 A.I.R. 1929 All. 769 : 52 All. 96 : 124 I.C. 529, Secretary of State v. Bhagwan Prasad.

9. (43) 30 A. I. R. 1943 Mad. 327 : 210 I.C. 317, Venkateswaraswami v. Sub-Collector, Bezvada.

10. (44) 31 A. I. R. 1944 Bom. 200 : I. L. R. (1944) Bom. 90 : 215 I.C. 101, Mahadeo Krishna Parker v. Mamlatdar of Ali Beg.

namely, by (1) Raja of Sonapura and (2) Bhagwati Prasad Narain Singh were filed before the Collector under section 18 invoking a reference, and they necessitated a reference to the Court. The Court having seisin of the reference is empowered under S. 20 of the Act to direct appearance before him not only of the (a) applicant (that is, applicant for reference) but also (b) all persons interested in the objection except such (if any) of those as have consented without protest to receive payment of the compensation awarded. The term "interested" in (b) is wide enough to include both, the persons interested in supporting, or opposing the applicant, that means, clause (b) must have reference to parties having conflicting claims to the compensation either whole or part, as against the applicant and otherwise. Collector is thought of in clause (c) of the section in certain specified cases. The Court, therefore, had power, irrespective of any reference in that behalf, to investigate the claims of Onkarnath Dubey and Bishwanath Dubey. Their claims or, in other words, the valuation of their interest could not be lost sight of or left undetermined in valuing the interest of the proprietor of the co-sharer mukarraridars. In complying with S. 21 of the Act the Court had to consider the claims of the aforesaid Dubey's. The point raised is, therefore, decided in favour of the respondent. The Collector in F. A. no. 44 was not entitled to raise the question, he himself having made the reference. The point also was not seriously pressed on his behalf.

[84] In the result the appeals succeed to the extent indicated above, and the judgment of the learned District Judge stands modified accordingly.

[85] In conclusion Appeal no. 44 is allowed with costs to be paid by the principal respondents nos. 1, 2 and 3 (mukarraridars) and Appeal no. 46 is allowed in part. Under the circumstances, each party will bear its own costs.

Meredith, J.—I agree.

Appeal No. 44 allowed.

G.B./D.H. Appeal No. 46 partly allowed.

A. I. R. (33) 1946 Patna 459 [C.N. 154]
MEREDITH AND RAY JJ.

Karu Singh and others—Plaintiffs—Appellants. v. Nathuni Lal and others—Defendants—Respondents.

Appeal No. 174 of 1942. Decided on 7th December 1945, from original decree of Sub-Judge, Monghyr, D/- 15th August 1942.

Bengal Land Revenue Sales Act (XI of 1859), Ss. 2, 3 — Terms 'due', 'Kisht', 'instalment' in Collector's revenue accounts have no reference to original Kishtbandi—'Kisht day' means latest day for payment of arrears fixed under S. 3—Sale for arrears after 'Kisht day'—Validity—Incorrectness in Collector's accounts—Proof of—Onus.

The words 'due', 'Kisht' and 'instalment' in Collector's revenue accounts have no reference to original Kishtbandi. The word 'due' means due as arrears within S. 2 and the word 'Kisht' or instalment means an instalment fixed for payment of what has already become an 'arrear' in the statutory sense. For facility and convenience of accounting these instalments are either one, two or four in a year according as the annual revenue payable is less than Rs. 10 or less than Rs. 50. Accordingly, the year stands divided into two or four parts and the 'Kisht day' or the latest day for payment of arrear is the day with which the above division of the year expires. When any instalment of arrear remains unpaid on the said last day, the Collector in his accounts shows the estate in arrear not in the sense that the unpaid amount becomes an arrear on and from the day following the latest day, but because the grace period allowed under S. 3 for payment of what had become arrears had expired. Sale, therefore, for arrears after the latest day is within the jurisdiction of the Collector and the onus is on the plaintiff, seeking to set aside the sale, to prove that there was no arrear or that the Collector's account is wrong; *Case law referred.*

[P 464 C 1; P 466 C 1]

P. R. Das, B. N. Rai and K. K. Sinha.—
for Appellants.
Sarju Prasad and Guneshwar Prasad—
for Respondents.

Ray, J.— This appeal arises out of a suit instituted by the plaintiffs-appellants for having it declared that the sale of village Andauli bearing tauzi No. 6074 on the Revenue Roll of the Collector of Monghyr, at an auction held on the 3rd June 1940, for arrears of revenue of March kishit of the year, the last date of payment for the kishit being 28th March of that year, was null and void. The defendant 1st party, who is the main contesting respondent here is the auction-purchaser. The defendants 2nd party are mortgagees of the 4 as. share of this tauzi, which is exclusive of the plaintiffs' interest of 12 as. in the estate. The defendants 3rd party are the co-sharers, having 4 as. interest in the estate. The present appeal is confined to the interest of the plaintiffs only, namely, 12 as. of the tauzi. The defendants 3rd party had brought another suit for the same relief against the very same sale in the same Court. Both the suits were dismissed, and it is only the plaintiffs of one suit who own 12 as. in the tauzi that have come up in appeal.

[2] They challenged the sale, mainly on two grounds. The first ground was that the

estate was not in arrear on or subsequent to 28th March 1940, and, therefore, it was sold contrary to the provisions of Act XI (11) of 1859. It was, therefore, contended that it was *ultra vires* of the Collector to sell the estate. The second ground was that the auction-purchasers, namely, the defendants 1st party are mere farzidars of the co-sharers defendants and their mortgagees, namely, defendants 2nd and 3rd parties, who colluded to default in payment of revenue, then got all processes relating to the sale fraudulently suppressed in order to bring about the sale and purchase. No notices under Ss. 6 and 7 of the Act were served, and thus there was irregularity in the sale. As a consequence property which is really worth Rs. 8,000 was sold for a sum of Rs. 225 only.

[3] The suit was resisted by the defendant 1st party, the auction-purchaser, on both the counts. It was pleaded that the estate was in fact in arrear, the payment up to the 28th of March, 1940, being short by Rs. 8-4-0, and that there was no collusion or fraud practised in conduct of the sale, the notices referred to in the plaint were duly served, and the sale was held in accordance with law.

[4] The learned Subordinate Judge negatived the plaintiffs' case on both these points. He held that Rs. 4-8-0 was really due from the proprietors of the tauzi and that amount was an arrear within the meaning of S. 2 of Act XI (11) of 1859, and 28th March was the last date for payment, as fixed by the Hon'ble Board of Revenue, in accordance with the provisions of S. 3 of the Act, and, therefore, the sale was valid and binding upon the appellants. On the point of suppression of processes and consequent loss on account of the more valuable property having been sold for a paltry sum of Rs. 225, he held that the plaintiffs were not entitled to take up that plea in the Civil Court as they had not specified this as a ground in their appeal before the Commissioner under S. 2, Bengal Land Revenue Sales Act, 1868. For this, he rightly enough relied upon the provisions of S. 33, Act XI (11) of 1859, which lays down:

[5] "No sale for arrears of revenue or other demands realisable, in the same manner as arrears of revenue are realisable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the

irregularity complained of : and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under S. 2, Bengal Land Revenue Sales Act, 1868."

[6] It is conceded that the ground was not specified as one of the grounds in their appeal to the Commissioner, and in this Court Mr. P. R. Das, who appeared for the appellants, did not debate the point.

[7] This appeal is, therefore, confined to a determination of the single outstanding question whether the sale is null and void on account of the fact that estate was not in arrear at the time of sale.

[8] Before I proceed further to consider the merits of this argument, I wish to add a few words as to the ground that was taken in the appeal to the Commissioner bearing on this point. They said, as it appears from Ex. 5, that the learned Collector ought to have considered the fact that the estate was not in arrears on the day the sale was held, and the Collector in his reply to his ground said :

"The estate was in arrears of revenue for Rs. 4-8-0 on the date of sale". This ground was, as it was presented to the Commissioner at the time of argument, in form and substance, that there was no arrear on account of the fact that Rs. 4-8-0 had been sent to the Collector by one of the co-sharers, by money order, on 1st April 1940, and the point was dealt with by the Commissioner in the following manner :

[9] "I do not find that there has been any irregularity in this case such as would vitiate the sale. The last date of payment was 28-3-40. It may be true that petitioner sent the amount due from him as land revenue by money order on the 1st April 1940. The Collector was not bound to accept this without the additional payment of dues for cess. This is not the first time that this estate has been in default and appellants have in my opinion only themselves to blame for the sale".

[10] In this Court the argument that the estate was not in arrears so as to justify a sale has taken a completely different shape. It is in the form that though there are 11 kishts—according to the original *kishtabandi* falling due on all the months of the year, excepting Bhado, there are two dates, however, namely, 12th January and 28th March on which all arrears have to be paid; that the Collector having purported to sell the estate for the arrears of March kish of the year 1940 it should be presumed that the arrears due to be paid on 12th January had been paid, and, therefore, what remained to be paid must be the dues of the kish, according to the *kishtabandi*, falling due after 12th,

January and before 28th March. The 12th, January corresponds to 17th of Pous 1347, and 28th March, 1940, corresponds to 5th of Chait, 1347. The argument is that it is the *kishtbandi* dues of the months of Pous, Magh, and Phagun, which only had become an arrear, according to the provisions of S. 2 of the Revenue Sales Law, and was thus the only sum payable, as arrear, on 28th March 1940. This sum comes to Rs. 10-13-6, consisting of two annas payable in the month of Pous, that is, Rs. 5-6-9, one anna appertaining to the kish of Magh, Rs. 2-11-4½ and one anna of Phagun, Rs. 2-11-4½. The appellants, therefore, contend that this sum of Rs. 10-13-6 having been paid on 28th March, the estate cannot be said to be in arrears. Anything more than that was to be paid only by way of a private arrangement between the co-proprietors, and this sum, if not paid on 28th March, could be paid on the following 12th January, 1941, and till then no proceedings could be lawfully taken to sell the estate.

[11] The validity of this argument assumes that what was paid on 12th January was in full satisfaction of all the arrears for which that day was fixed by the Board of Revenue under S. 3 to be the latest day for payment, which, in other words, amounts to saying that the dues that became arrears according to S. 2 of the Act after 28th March, 1939, till 12th January, 1940, had been paid. This, if correct, would mean that three-fourths of the revenue had been paid on 12th January. In substance the contention, therefore, is that the Collector was not entitled to sell the estate until after 12th January of 1941 which is the latest day for payment of the arrears subsequent to 28th March, 1940.

[12] It is complained that the Collector has failed to keep in view the distinctions between "kisht dues" according to *kishtbandi* "arrear" defined in section 2 of the Act and between "kisht day" and "latest day" for payment fixed by the Board of Revenue for payment of arrears under S. 3. This argument sounds very attractive at first sight and has to be examined carefully. The facts relevant to the issue have to be clearly ascertained in order to find if they justify the assumption upon which the argument is founded.

[13] The *kishtbandi* paper is Ex. 2, and is of the year 1790-91. The annual revenue is stated to be Rs. 325 in *sikka* coins. This is divided into two equal parts. The kish are so arranged that half the revenue is made due within one or other

of the two groups of months. The kishbandi is admittedly according to the era of Fasli year, which begins with the month of Asin. In the Kishbandi it is clearly shown that Asin, Kartik, Aghan, Pous, Magh and Phagun instalments together make up 8 annas of the revenue due. The Kishts falling due in the months of Chaita, Baisakh, Jeth, Asadh and Sawan make up the other half. Though the estate has been partitioned, there has been no change in the kishbandi. Applying the principles of S. 2, Act XI of 1859, all the instalments that fall due in the months beginning with Asin and ending with Phagun and making up half the annual revenue must have become, in all certainty, arrears by the first day of the month of Chait, which corresponds to 24th March and, therefore, 28th March, is fixed as the latest day for payment for these arrears, would be quite in accordance with S. 3 of the Act. The other 8 annas kishts commencing with the month of Chait and ending with the month of Sawan become arrear undoubtedly on the first day of Bhado and necessarily the latest day for payment of all these arrears must come some time after the end of Sawan, and it is admitted that 12th January, which corresponds to the 17th Pous, 1347, is one of the dates so fixed under S. 3, and, therefore, it is quite easily conceivable that later half of arrears were made payable as arrear on that date. It is also permissible under the law to make three-fourths of revenue to be cleared up "as arrears" on the 12th January and one-fourth on 28th March. That would be completely in accord with S. 3. But it will appear from the plaintiffs' own case, as stated in para. 3 of their plaint, that the arrears of annual revenue payable for the entire estate, that is Rs. 43.6.0, have always been paid in two equal instalments in January and March. The plaintiffs further submit that 12th January is the latest date fixed for payment of revenue for January kish, while 28th March for March kish. They tried to make out that there were two other kishs, namely, June and September kishs, 7th June and 28th September, being respectively the latest dates for payment of those kishs, but that case has been abandoned and has never been pressed. The fact remains that the above are the only two latest dates for payment of all arrears of revenue fixed by the Board under

S. 3. It is noteworthy that this fact is not disputed.

[13A] It is also not disputed, as already stated by me, that the distribution for the purpose of payment is half and half, that is to say, half the arrear is to be paid by 12th January and the other half by 28th March. These dates having been fixed under S. 3 of the Act for payment of arrear, default in payment of which will entail the liability of the estate to sale, the Collector will have, in that event, jurisdiction to fix any date for the sale thereof without waiting for the following "latest day for payment" as is contended here. This will also appear to be so from how the parties have been paying the arrears of revenue. The documents that will show this are Exhibits 7 to 7(r). Exhibits 7 (c), 7 (d), 7 (e) and 7 (q) are revenue chalans, showing payment of what is described in those documents as fixed collection of kish January 1940. All the payments made under these documents come up to a total amount of Rs. 19.1.6. Exhibits 7, 7 (a), 7 (b) and 7 (r) are revenue chalans, showing the amounts paid under the head "fixed collection of kish March 1940" and they altogether come up to Rs. 13.9.6. There is another Exhibit 7 (s), which is a money order of Rs. 2-13.0 on account of revenue sent to the Collector for this March kish, 1940. The payments, therefore which have been received and credited by the Collector in his Revenue Accounts for March kish come up to Rs. 16-6-6. Adjusting the aforesaid two sums and other small surplus amount standing to the credit of the zamindars, the Collector's account showed an arrear of Rs. 4-8-0 of March kish. The conduct of the plaintiffs, in preferring an appeal to the Commissioner on the ground that the Collector should have accepted the sum of Rs. 4-8, which would then have wiped all the arrears that had to be paid by them on 28th March towards March kish, also corroborates the view that 28th March was the date fixed as the latest date for payment of half the arrear of revenue for the year.

[14] Mr. B. N. Rai in reply contended that they had been making advance payment by paying half the annual revenue, that is, Rs. 21-11.0 on the 28th March, while under the kishbandi and according to the latest dates for payment fixed by the Board of Revenue they were only liable to pay Rs. 101 and odd. This is an argument which was not advanced so far, and

besides there are no materials on record to come to any finding in support of this contention. He further says that the statement in para. 3 of the plaint as to payment in two equal instalments on the 12th January and the 28th March refers to a private arrangement. Firstly, there is no proof of that. Secondly, conceding for the sake of argument that the equal distribution of arrears of revenue is a matter of private arrangement as between the proprietors, the fact still remains that the 12th January and the 28th March are the latest dates for payment of all arrears of revenue for the year. If then, as I have shown above, the proprietors had only paid Rs. 19-1-6 on the 12th, January, it necessarily followed that the balance of the annual revenue of Rs. 43 and odd must be cleared up by the 28th March, and any default in payment either of the whole or a part thereof must lead to the consequence of the estate being sold for arrears.

[15] The learned Subordinate Judge has come to a very clear finding with which I concur, in its entirety, that what was payable on the 28th March and what was not paid was an arrear. In their appeal to the Commissioner the plaintiffs had taken up a ground of hardship, and there the Collector had pointed out in reply to their grounds of appeal that the estate had two previous defaults on 12th January 1939, and 28th March, 1939. This has not been challenged by reference to any evidence in this Court, nor is it denied as a fact. Therefore, if they defaulted on 28th March, 1939, they defaulted in the sense in which the Collector maintains his accounts, namely, that they failed to pay half the arrears of the annual revenue on 28th March 1939. The Collector, it must be presumed, must have started proceeding for bringing the estate to sale which must have been averted by satisfaction of the balance remaining in arrear. Therefore, it must be assumed that all arrears till 28th March, 1939, had been paid off. Then, it may be noticed, that this cuts Mr. B. N. Rai's argument that they had been paying in advance at the root, because from 28th March, 1939, to 28th March, 1940, is one year, and the revenue due according to the *Kishtbandi* of the Mahal for the year must have been converted into arrears by 28th March, 1940. Therefore, adjusting what was paid for the January *kisht* of 1940 and what was paid towards the March *kisht* of 1940, as

shown above, there still remains a balance. This balance, according to the Collector's revenue papers, is Rs. 4-8-0. The theory of advance payment vanishes. The learned Subordinate Judge accordingly finds:

[16] "Such being the position, I cannot agree with the plaintiffs that there was no arrear of revenue left after crediting all the payments made as disclosed by the *chalans* up to March *Kisht* of 1940 (*vide* Exhibit 7 series). The 28th March 1940 corresponded to the 5th of *Chait* 1347 *Fasli* and the last date of *Phagun* of that *Fasli* year corresponded to 23rd March, 1940. Under section 2 of Act XI of 1859, the unpaid revenue of a particular month fixed under the original *kishtbandi* (Ex. 2) becomes an arrear of revenue on the 1st day of the following month. So even according to the settlement—*kishtbandi* the revenue for *Phagun* 1347 *Fasli* became an arrear on the 1st of the following *Chait* corresponding to 24th March 1940. Thus, having applied my mind even to the date of the original *kishtbandi*, I find that the revenue payable for *Phagun* of that year had also become payable as arrear and ought to have been paid up by the arrear *kishtbandi* on 28th March of that year. Thus we find that the defaulted revenue of Rs. 4 and odd for which sale has taken place, had already become an arrear and ought to have been paid up upto the 28th March 1940. To determine the existence of the arrear I have also applied my mind to the revenue of the year previous to 1940 in the light of the original settlement *kishtbandi*, and I have found on calculation that the arrears in full had been paid up to March 1939. So the subsequent revenue determined even by the original *kishtbandi* settlement deed formed the arrears which had to be paid up half in January and the remaining half in March 1940. Having thus considered the matter in view of its different aspects as aforesaid, I feel convinced that the revenue of Rs. 4 and odd for which sale had been held was already in arrears and had to be cleared off by payment before the 28th of March 1940. This was not paid up within the time fixed by Act XI of 1859, but was remitted by money order on the 1st of April, 1940, as stated in paragraph 3 of the plaint of suit No. 204 of 1941.

[17] Nothing has been shown to us to demonstrate the incorrectness or inexactitude of this finding with which I entirely agree. It is obvious from the aforesaid quotation that the learned Subordinate Judge has kept in view the distinction between the *kisht* dates according to the *kishtbandi* on which the revenue only falls due and the latest dates for payment fixed by the Board of Revenue according to the provisions of S. 3. He has not confused himself between what is due according to the *kishtbandi* and what is an arrear. The appellants' contention, based as it is, on either of the alternatives as premised above falls to the ground as it is neither a fact that they had paid three-fourths of the revenue on 12th January, 1940, nor that anything other

than what is arrear in law was to have been paid on 28th March and remained unpaid, or, in other words, the deficiency in payment towards March kist of 1940 was in respect of an arrear, and not what would be due after 28th March. Further support is sought to be drawn, in favour of the appellants' contention as propounded by them, from the terms in which the arrears for payment of which the sale was held, are described in the sale proclamations and notices, reports of arrears and sale certificate. The proclamations and notices (Ex. G series) mention them as "for payment of Rs. 4-8-0 due on account of payment of Government revenue due up to 28th March, 1940, current year." Arrear reports (Ex. A series) state: "The estates that have fallen into arrears of land revenue for the kist ending 28th March, 1940." The sale certificate (Ex. J) states: "Sale took effect on 3rd June, 1940, for satisfaction of Rs. 4-8-0 on account of instalments due up to 28th March, 1940."

[18] The argument based as it is on these descriptions pays little attention to the meaning of the words "due", "kist" and "instalment" occurring in the above documents. They have no reference to the original kistbandi. They are terms used in the Collector's revenue accounts and papers maintained under rules and instructions of the Board of Revenue. The word "due" here means due as "arrears" (within the definition of section 2 of the Act), and the word "kist" or "instalment" means an instalment fixed for payment of what has already become an 'arrear' in the statutory sense. For facility of payment and convenience of accounting these instalments are either one, two, or four in a year according as the annual revenue payable is less than Rs. 10, or less than Rs. 50, or more. Accordingly, the year stands divided into two or four parts, and the kist day or the latest day for payment of arrear is the day with which the above division of the year expires. When any instalment of arrear remains unpaid on the said last day, the collector in his accounts shows the estate in arrear, not in the sense that the unpaid amount becomes an arrear on and from the day following the latest date, but because the grace period allowed under the section for payment of what had become arrears had expired.

[19] To elucidate the point I shall call attention to the Board's rules and instructions relevant to the issue which are summarised at p. 9 of the Manual:

[20] "In consequence of these changes the Collectorate Tauzi Department since 1895 realised Land Revenue, not according to the instalments fixed in the original agreements, but according to the amounts due as arrears on each latest date of payment. Chapter II, S. 1 of the Manual describes the Tauzi Roll of a district as a list of the estates from which the land and police revenue of the district is collected, showing the revenue assessed upon each estate, divided into the amounts due on each latest day of payment. (The description is not exactly correct as these amounts are really overdue as arrears before each latest day of payment). These instalments are carried forward to the Tauzi Ledger which is written yearly, and are shown also in Return X of the demands, collections and balances which is submitted by the collector after the close of each kist. In respect of Return X it is specially enjoined in R. 5, Chap. II, S. XVIII, that the 'demand' for a particular kist should include only those sums for the recovery of which legal steps can at once be taken on the day immediately following the latest day of payment. The Tauzi Department practice is therefore in conformity with the Revenue Sales Law though the instalments of revenue as referred to in S. 2, Act XI of 1859 are no longer noted in its registers. The arrears of revenue which the Collector enters in his Return No. X as not having been paid on the last day of the Tauzi 'kist', and for which he advertises estates for sale, are *a fortiori* also arrears of revenue within the meaning of Act XI of 1859 as they remained unpaid on the first of the month of the appropriate era following that on which they were due for payment according to the original agreement."

[21] In order to examine the value of this contention a little more closely I feel it incumbent upon me to deal with a few decisions. The case in 19 P. L. T. 705¹ is a case in point. In that case there were two dates fixed by the Board of Revenue, namely, the 12th of January and 28th March, as it is in this case, and there the default was in respect of what the Collector called January kist, and their Lordships after an elaborate reference to the rules framed by the Board of Revenue for the purpose of revenue collections and for the purpose of maintaining the Collector's accounts came to the conclusion that the word "kist" in the Collector's account does not mean kist according to kistbandi, but it means the latest day for payment as fixed by the Board of Revenue. Their Lordships have said in that case:

[22] "The Tauzi Ledger of this estate mentions Rs. 5-8-10 as the net demand payable in respect of the January kist. The expression 'kist' as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest day for payment of arrears of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, in

1. (38) 25 A.I.R. 1933 P.C. 248 : I.L.R. (1933) 2 Cal. 665 : 32 S.L.R. 931 : 65 I. A. 380 : 176 I. C. 881 : 19 P.L.T. 705 (P.C.), Dinabandhu Chatterjee v. Ashutosh Chatterjee.

the case of this estate, which paid revenue in two instalments the expression 'January kist' means the period beginning on 29th March and ending on 12th January and the 'kist day' means the latest day of payment on which that period expires—now 12th January 1930, as shown in the Tauzi Ledger, was the latest date for payment of that sum. But it appears from the tauzi Ledger that of the aforesaid net demand, Rs. 4-5-1 was duly paid on or before 12th January 1930; and that only Rs. 1-3-9 remained unpaid on the last day fixed for the payment of arrears. On the expiry of that day the estate became liable to sale by public auction, and the sale on the date in question, namely, 22nd March 1930, did not infringe the law".

[23] This observation can quite appropriately be made applicable to the facts of this case, making only relevant changes with regard to the sums that were payable. In this case, as I have shown, according to the Collector's Ledger after the latest date for payment of March kist, that is, 28th March 1940, there was an arrear of Rs. 4-8-0 out of the net demand of Rs. 21-11-0. This demand, according to the method of accounting maintained in the Collector's Ledger under the rules of the Tauzi Manual, must be arrears.

[24] Reliance is placed by the appellants on the case in 10 Pat. 496². In that case it was found as a fact that the revenue of Rs. 47 and odd fell due on 28th March and it became an arrear from 1st April while the latest day for payment of the arrear, according to S. 3, was 7th June. The proprietors having defaulted to pay what was payable on 28th March and the property having been sold on the 6th June, their Lordships held that under the scheme of Act XI of 1859 mere default in payment of what was due under the kistbandi should not entail the liability of the estate to be sold. According to S. 3, the Act gave a period of grace to the proprietors to clear the arrears, and no legal proceedings could be validly taken before the latest day of payment expired.

[25] In 19 P. L. T. 705,¹ at p. 708, their Lordships said, referring to 10 Pat. 496²:

[26] "That judgment cannot be taken as displacing the meaning which their Lordships have, in the present case, shown to attach to the entry of the date 12th January 1930, under the head 'kist' in the Tauzi Ledger."

[27] They have further said that that case is correct on its own facts.

[28] Next reliance was placed on the Full Bench case of this Court in 12 Pat. 750³

2. (31) 18 A.I.R. 1931 P.C. 57; 10 Pat. 496; 130 I.C. 676 (P.C.), *Mt. Saraswati Bahuria v. Suraj-narayan Chaudhuri*.

3. (33) 20 A. I. R. 1933 Pat. 236; 12 Pat. 750; 143 I. C. 869 (F. B.), *Jadunandan Singh v. Srimati Savitri Devi*.

at p. 755. That case also holds that when the original kistbandi is either unknown or forgotten, the dates fixed as the latest day for payment by the Board of Revenue are popularly known as 'kist'. In that particular case there were four such dates, namely, 7th June, 28th September, 12th January and 28th March. The original kistbandi was also before their Lordships. The arrear that remained unpaid was in respect of what was payable on 7th June, and their Lordships held that according to the Collector's accounts what has always been paid on 7th June must be held to be the arrear and not the kist due and, therefore, the Collector had jurisdiction to put the property to sale without waiting for the next latest date for payment of arrears.

[29] The case in 59 I. A. 68⁴ is a case in which the original kistbandi had either been forgotten or unknown but as a fact it was found that the kistbandi dates synchronised with the latest dates for payment.

[30] In 53 I. A. 246⁵ kist dates in the Collector's accounts were held to be the latest dates for payment of arrears and the sale held between two such latest dates for what was left unpaid in the first of such dates was held valid.

[31] There remains only one other case which I must deal with at some length. It is the case in I. L. R. (1942) 2 Cal. 125⁶. Certain principles have been very lucidly laid down in that case, the most significant of which is that when a plaintiff wants to have it declared that a sale held for arrears of revenue by the Collector is null and void or otherwise invalid, the onus lies very heavily on him to show that there was no arrears of revenue due from him in respect of which the estate might be legally sold and it is also for the plaintiff to show that the Tauzi Register has been incorrectly prepared. They further say,

[32] "It seems, therefore, to follow that, when arrears of revenue are shown as being due in the Tauzi Register from any estate in respect of any particular kist, this must be taken as showing, until the contrary is proved, that the last day of the kist, is the latest day of payment for the arrears and that, if such arrears are not paid by that day, the estate will prima facie be liable to be brought to sale under the provisions of S. 3, of Act XI of 1859."

[33] In support of this proposition their Lordships followed the case in 19 P. L. T.

4. (32) 19 A.I.R. 1932 P.C. 61; 59 Cal. 1034; 59 I. A. 68; 136 I. C. 410 (P.C.), *Krishna Chandra v. Pabna Dhana Bhandar Co. Ltd.*

5. (26) 13 A.I.R. 1926 P. C. 126; 6 Pat. 200; 53 I. A. 246; 98 I. C. 930 (P. C.), *Jagadishwar Narayan v. Muhammad Hariq Hussain*.

6. (43) 30 A.I.R. 1943 Cal. 62; I. L. R. (1942) 2 Cal. 125; 204 I. C. 598, *Rukmini Kishore De v. Jai Chandra Datta Ray*.

705¹, which I have already referred to. In that particular case before coming to their conclusion their Lordships of the Calcutta High Court have said, which can be very appropriately applied to the facts of the present case, that:

[34] "In the case with which we are now dealing, there is nothing to indicate that the Tauzi Ledger had been wrongly prepared, nor have the plaintiffs succeeded in showing that there were no arrears of revenue in existence on 12th January (in the present case on 28th March), in respect of which their estate might be legally sold."

[35] The result of examination of the aforesaid authorities is that 'kist' in Collector's accounts means the kist for payment of arrears and 'kist day' means the latest dates for payment of such arrears fixed under S. 3 of the Act. The onus is on the plaintiffs to establish that the Collector's account is wrong. The theory of advance payments propounded by the appellants is based on the hypothesis that from the start of the kistbandi and settlement they have commenced paying in advance in two equal instalments. The Court must not act upon hypothesis but upon realities. I have shown above how after paying the arrears that remained unpaid on the 28th March 1939, the appellants and their co-sharers have paid in course of the whole year, Rs. 4-8-0 less out of Rs. 43 and odd, the annual revenue, and it is this sum of Rs. 4-8-0 which represents the 'arrear' and not "due".

[36] Having in view the distinction between what is due under a kistbandi and what is an arrear within the meaning of S. 2 of Act XI of 1859 and having regard to the entire evidence on the record I am of opinion that Rs. 4-8-0, which has been described to be the arrear of the March kist, is an arrear within the meaning of S. 2 of the Act, and 28th March 1940, was the latest day for payment of this sum as fixed by the Board of Revenue under S. 3 of the Act. The plaintiffs have failed to establish that this was not an arrear. Therefore, in agreement with the learned Subordinate Judge in the Court below I hold that the appeal has no merits and must be dismissed with costs.

[37] The cross-objection directed against disallowance of costs to the respondents by the Court below has been pressed, but in the circumstances we do not think there is any reason to interfere with the order of the learned Subordinate Judge in that connection. The cross-appeal, therefore, stands dismissed too.

Meredith J.—I agree.

G.M./D.H.

Appeal dismissed.

A. I. R. (33) 1946 Patna 466 [C. N. 155]

MANOHAR LALL AND REUBEN JJ.

Dindeyal Ram—Appellant v. Ramzan Mistri—Respondent.

Appeal No. 292 of 1944, Decided on 31st January 1946, from appellate order of Judicial Commissioner, Chota Nagpur, Ranchi, D/-13th June 1944.

Chhota Nagpur Tenancy Act (6 of 1908), S. 47—Land originally acquired for cultivation but subsequently being used for non-agricultural purposes can be sold in execution.

The protection from saleability by money decree provided by S. 47 is intended only for agricultural lands. It would be highly inequitable to extend such protection to lands which were once upon a time acquired for cultivation but are for some time past being used for other purposes obviously unconnected with agricultural operations, as for example, as residence of shopkeepers: ('35) 22 A.I.R. 1935 Pat. 105, ('37) 24 A. I. R. 1937 Pat. 321 and Misc. Appeal No. 318 of 1933, *Foll.*; ('27) 14 A.I.R. 1927 Pat. 324, *Not followed.* [P 467 C 1].

Jyotirmay Ghose—for Appellant.

G. C. Mukherji—for Respondent.

Manohar Lall J.—The only question for decision in this appeal is whether the Courts below were right in refusing to apply the provision of S. 47, Chota Nagpur Tenancy Act, to the plot which was sought to be sold in execution of a rent decree obtained by the respondent.

[2] The plot in question is No. 771 and is a part of Khata No. 74. The learned Advocate for the appellant stresses, relying upon the words of S. 47 that:

[3] "No decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding or any portion thereof, nor shall any such right be sold in execution of any decree or order."

[4] The Courts below, however, have found that plot No. 771 had long ago lost its nature of raiyati character and not only had the land completely lost its original nature of agricultural land, but also it was not necessary for the owners for the cultivation of the other raiyati lands. The learned Judicial Commissioner says:

[5] "For the purpose of cultivation they have houses in other villages. These two houses are meant to be used as shops and the judgment-debtors were using these houses as shops and not appurtenance to the agricultural holding. Even the witness of the appellant judgment-debtor stated that they had separate residential house in their village and the attached houses were being used as shops".

[6] A little later on, the learned Judge makes similar observations:

[7] "Plot no. 771, though noted as part of the raiyati holding No. 74, once upon a time in 1908, it has altogether lost its nature as raiyati land. It is now a residence of shop-keepers, and its possession is quite unconnected with the agricultural opera-

tions on the west of the holding and in fact on other portions of the holding the judgment-debtor and his co-sharers have houses. Here it might have been acquired once upon a time for cultivation though even this is not clear, but for some time past it is being used as residence of shopkeepers and it would be highly inequitable to extend to this sort of land and house obviously unconnected with agricultural operations, the protection from saleability by money decree which was intended only for agricultural lands".

[8] The view of one learned Judicial Commissioner is supported by the cases in A.I.R. 1935 Pat. 105,¹ and A.I.R. 1937 Pat. 321² and an unreported decision given by a Division Bench of this Court in Misc. Appeal No. 318 of 1933 decided by the late Chief Justice, Courtney Terrell, C.J., and Varma, J., on 27th March 1936. The learned Advocate for the appellant drew our attention to the case in 8 P. L. T. 671³ and argues that it is immaterial to what use the land is now being put if it is held or found that the original character of the land of which the portion in dispute is now sought to be sold was raiyati. In face of the decisions, cited above, this argument is not acceptable to us. It may appear somewhat hard if the point of view of the judgment-debtor alone is seen. On the other hand, the decree-holder is losing his valuable right of a decree which he has obtained from a competent Court. I would dismiss this appeal, but there will be no order as to costs.

Reuben, J. — I agree.

N.S./D.H. *Appeal dismissed.*

1. ('35) 22 A. I. R. 1935 Pat. 105, Rama Charan v. Gobindram.
2. ('37) 24 A.I.R. 1937 Pat. 321:16 Pat. 316:169 I.C. 872, Ghasiram Marwari v. Shiba Prosad Singh.
3. ('27) 14 A. I. R. 1927 Pat. 324 : 6 Pat. 440 : 104 I. C. 218 : 8 P. L. T. 671, Mt. Bibi Aisha v. Mahabir Prasad.

A. I. R. (33) 1946 Patna 467 [C. N. 156]
MANOHAR LALL J.

Najiman Nissa Begum — Appellant v. Serajuddin Ahmed Khan — Respondent.

Appeal No. 57 of 1941, Decided on 15th May 1945, from appellate decree of Dist. Judge, Cuttack, D/-4th April 1941.

Dissolution of Muslim Marriages Act (1939), S. 2 (ii) — Husband refusing to pay prompt dower — Suit by wife to recover same — Husband denying that prompt dower was payable by him — Suit decreed — Husband is bound to maintain wife — Suit by wife for dissolution of marriage — No maintenance paid for over two years before suit — Defence that husband was not bound to pay maintenance unless wife comes and stays with him — wife is entitled to dissolution of her marriage.

Where the husband refuses to pay the prompt dower and takes the defence, when a suit has been

instituted to recover it, that there was no prompt dower payable by him, that the wife has relinquished a portion of that dower debt and that the balance has been converted into deferred dower, but the Court decides that the wife is entitled to the payment of her dower debt which, however, remains still unpaid, the wife can refuse to go and stay with the husband and the husband is bound to maintain such a wife. [P 468 C 2; P 469 C 1]

Consequently, where, before the institution of a suit by the wife for dissolution of marriage, the wife has not been paid any maintenance for over two years and is not paid any maintenance since the institution of the suit and the attitude of the husband is that he is not bound to pay maintenance unless and until the wife comes and stays with him, the facts come within the mischief of S. 2 (ii) and the wife is entitled to dissolution of her marriage: ('44) 31 A. I. R. 1944 Lah 336 and ('44) 31 A.I.R. 1944 All. 23, *Disting.*; ('43) 30 A.I.R. 1943 Lah. 310 and ('42) 29 A. I. R. 1942 Lah. 92 *Ref. to.* [P469 C 2]

M. S. Rao and H. P. Bhagat — for Appellant.
S. K. Ray for B. K. Ray — for Respondent.

Judgment.—In this case after I had proceeded to deliver judgment it was represented to me that there was a chance of an amicable settlement between the parties, the Advocate-General stating that his information was that the wife was willing to come and stay with the husband, but her parents were not allowing her to do so. He, therefore, suggested that if the real wishes of the wife were ascertained and if she was unwilling to live with him, the husband will have no objection to the dissolution of the marriage. Accordingly I directed Mr. Subba Rao to himself proceed to the house of the wife in Cuttack and ascertain her real wishes. He informed me that the wife is not willing to stay with the husband owing to his behaviour in the past. Accordingly I proceed to deliver judgment.

[2] In this appeal the principal question for decision is whether the facts proved entitled the wife to claim dissolution of her marriage with the respondent. The plaintiff is admittedly the married wife of the respondent. Marriage took place in 1925. The parties apparently lived as husband and wife till 1931 or 1932 when the wife was attacked with malaria in Balasore—that is the place where the family of the husband resides. But the husband in the course of his duties had to remain away from Balasore. Thereafter she came to Cuttack or rather was brought to Cuttack by her brother as it was alleged that she was not being properly looked after by the family of the husband during her illness. Soon after the defendant married another wife without the previous consent of the plaintiff. This was followed by a notice (Ex. 2) which was sent

to the defendant on behalf of the plaintiff demanding from him her prompt dower and also maintenance at the rate of Rs. 40 a month. No reply was sent to this notice. The plaintiff then instituted a suit for recovery of the dower debt and also for return of certain moveables as it was alleged that she was not allowed to bring them from Balasore. In that suit the defence was that the plaintiff had voluntarily relinquished a portion of her dower debt and also had converted the balance to deferred dower. The matter came up to the High Court where it was decided that whether the wife's allegation that she was coerced to enter into the agreement to relinquish the dower debt was true or not, as the relinquishment took place when she was a minor, the defendant is bound to pay the full dower debt. The decree of the High Court was passed on 21st December 1937. That decree is being realised through the execution Court where the defendant has been able to get an order for instalments. I was informed that warrant of arrest was applied for by the wife to recover part of her decretal dues.

[3] All the above facts are fully established and show that the feelings between the parties are so embittered that there would be no peace between the husband and wife if they live together. But if the law does not entitle the wife to dissolve her marriage this Court will not be able to help her. The suit for dissolution of marriage was based upon the provisions of S. 2, sub-cl. (ii) of Act VIII (8) of 1939, to the effect that if husband has neglected to maintain his wife for over two years she is entitled to claim dissolution. The defendant says that he is not bound to maintain his wife because she refuses to live with him notwithstanding his efforts to induce her to come and stay with him as his wife. She, rather her parents, refuse to allow her to do so. The wife on the other hand says that she is not bound to live with her husband until her dower debt has been paid and further that the husband has never asked her to come and live with him and has mercilessly neglected her and has not paid any maintenance.

[4] The learned Munsif did not believe the denial of the defendant of the allegation that the plaintiff left for Cuttack in 1932 after suffering from malaria, but he thought that she came to her father's house without any reason and without the permission of the husband. He also thought that there was no reason to disbelieve the evidence led on behalf of the defendant, that he came with

an offer to take the plaintiff back to his house but met with cold rebuff from the parents of the plaintiff. In these circumstances the learned Munsif decided that no cause arose to the plaintiff to claim maintenance as she was not subjecting herself to the control of the husband. Accordingly he dismissed the suit.

[5] On appeal the learned District Judge found as a fact that the husband has not been maintaining the wife since 1932, that she had cause to leave Balasore and come to Cuttack as alleged by her, but he thought that it was the duty of the wife to go back to the husband when she had recovered and it was not the business of the husband to come and ask his wife to return to him. The learned Judge did not think it necessary to give any finding upon the evidence which was led on behalf of the husband that he did come to fetch his wife back to go and stay with him. The attention of the learned Judge was drawn to para. 213 of Mulla's *Muhamedan Law*, 12th Edn., p. 227, where it is stated that the husband is not bound to maintain his wife who refuses herself to him or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt dower, but although he thought that there was some force in this contention, he did not accede to the argument in these words:

[6] "I do not think, however, that this argument really assists the appellant because I have not been shown that apart from the legislation of 1939 failure to maintain a wife afforded any ground to divorce under the Muhamedan Law. That was a right accruing to the wife at any rate as far as the Civil Courts are concerned by the Act of 1939. By that time the prompt dower was being paid. Therefore at the time the Act came into operation as the wife was living separate from the husband, he was not under the duty to maintain her." Accordingly he dismissed the appeal."

[7] In my opinion upon the facts found the wife is entitled to a decree for dissolution. The husband refused to pay the prompt dower. He took the defence when a suit had been instituted to recover it that there was no prompt dower payable by him, that the wife had relinquished a portion of that dower debt and the balance had been converted into deferred dower. The High Court, however, decided in December 1937, that the lady was entitled to the payment of her dower debt. The dower debt is still unpaid. In these circumstances according to Baillie's *Principles of Muhamedan Law* quoted in para. 213 of Mulla's book, the wife can refuse to go and stay with the husband and the husband is bound to maintain such a

wife. The suit was instituted on 31st July 1939 after the Dissolution of Muslim Marriages Act came into operation. The suit for recovery of dower debt was instituted in 1932 and, as already stated decided, in 1937. It follows that before the institution of the suit the lady had not been paid any maintenance for over two years. The lady is not being paid any maintenance since the institution of this suit. Indeed the husband's attitude in this Court was that he was not bound to pay maintenance unless and until the lady comes and stays with him. In these circumstances the facts come within the mischief of S. 2, sub-cl. (ii) of Act VIII (8) of 1939, and the lady is entitled to dissolution of her marriage.

[8] The learned Advocate-General drew my attention to some authorities and it is desirable that I should deal with them. He relied very strongly upon a recent decision of Lahore High Court (A. I. R. 1944 Lah. 336.¹) That case was decided upon the facts that a Muhamedan wife cannot compel her husband to divorce his other wife and if she refuses to live with him unless he divorced his other wife, there is no liability on the husband to maintain the wife and his failure to do so would not entitle her to get a divorce under S. 2, sub-cl. (ii) of Act VIII (8) of 1939. The facts here are entirely different. Moreover the learned Chief Justice quoted with approval the passage which I have referred to above from Mulla's Muhamedan Law. The learned Chief Justice observes at p. 338 that Baillie and other Text book writers confirm the view that a Muhamedan husband is not legally bound to provide maintenance for his wife if the latter without reasonable cause refuses to live with him. In this case the lady had a reasonable cause for refusing to live with the husband because her prompt dower was not paid. In this view of the matter the husband was bound to maintain her during the period that he himself was in fault.

[9] Reliance was placed upon A. I. R. 1944 All. 23.² The facts of that case are entirely different from the facts of the present case as it was observed there that where the wife through her own conduct leads the husband to stop the maintenance, the Court will not allow dissolution of marriage and specially where the wife or her parents are

entirely to blame and no blame attaches to the husband, it cannot be said that the husband has failed to provide for the maintenance of the wife. In the present case, upon the facts found, no blame can attach to the wife because it was the failure of the husband to carry out his contract that gives the wife a right under the Muhamedan Law to refuse to go and live with him. Mr. Subba Rao on the other hand referred to the case in 210 I. C. 587³ (a case entirely different on facts) and the decisions of two Single Judges of the Lahore High Court, 194 I. C. 567⁴ and 199 I. C. 847⁵, but I do not consider it profitable to deal with these cases.

[10] It will be noticed that so far I have proceeded entirely upon the plain words of S. 2, Muslim Divorce Act, but I have also perused the evidence adduced on behalf of the defendant and I am not satisfied that the defendant ever made any honest effort to request his wife to come and live with him. The evidence leaves the impression in my mind that the witnesses are speaking of the time when the lady had instituted the dower suit. At or about that time undoubtedly an effort was made probably with a view to avoid the unpleasantness of the litigation which may be carried or already was in Court or possibly just before that when the notice was received by the husband in the year 1932 through a lawyer, but no genuine effort has ever been made by the husband to induce his wife to come and live with him. I entirely disagree with the view of the learned District Judge that the wife herself should have gone to the house of the husband as it was not the business of the husband to go and ask his wife to return to him. The learned District Judge did not rely upon the evidence of her brother who spoke of the social custom prevailing amongst the family according to which the wife could not be expected to go to the husband without being sent for by the husband through a respectable person, if for some reason the husband was unable to go to the house of his wife. In my opinion, the learned Judge was ignorant of the well-known custom which prevails amongst the society to which the parties belong. No wife of the position of this family or of a family situated in similar circumstances would go to her husband's house unaccompanied by a

1. ('44) 31 A. I. R. 1944 Lah. 336 : I. L. R. (1945) Lah. 517 : 216 I. C. 194, Zafar Hussain v. Mt. Akbari Begum.

2. ('44) 31 A. I. R. 1944 All. 23 : I. L. R. (1944) All. 27 : 211 I. C. 384, Mt. Badrunnissa Bibi v. Muhammad Yusuf.

3. ('43) 30 A. I. R. 1943 Lah. 310 : 210 I. C. 587, Mt. Zubaida Begum v. Sardar Shab.

4. ('41) 28 A. I. R. 1941 Lah. 167 : 194 I. C. 567, Manak Khan v. Mulkban Bano.

5. ('42) 29 A. I. R. 1942 Lah. 92 : 199 I. C. 847, Akbari Begum v. Zafar Hussain.

proper escort sent by the husband, and if she went herself this would be considered derogatory to the position of the wife and also to the position of her family.

[11] I am satisfied that the husband in this case has deliberately neglected to maintain his wife and that he has never made any attempt to induce his wife to come and live with him and he has never sent any one to bring his wife to him in a proper and decent manner. Further that the wife was perfectly within her rights in law to refuse to go to her husband so long as her dower debt was unpaid a portion of the dower debt is unpaid even till today. It is a satisfaction to me that the law as applied to the peculiar facts of this case allows me to dissolve this tie between the plaintiff and the defendant as otherwise they would be forced to lead a life of bitterness and continued unhappiness. In the result I would allow the appeal, set aside the decision of the Courts below and decree the suit of the plaintiff and grant her a decree dissolving her marriage which took place with the defendant in 1925. I would allow the plaintiff her costs in all the Courts. Leave to appeal is refused.

V.R./D.H.

Appeal allowed.

A. I. R. (33) 1946 Patna 470 [C. N. 157]

MANOHAR LALL AND SINHA JJ.

Mahadeo Lal and another—Appellants.

v.

*Pratap Udaynath Sah Deo and others
—Respondents.*

Appeal No. 165 of 1942, Decided on 20th December 1945, from original decree of Sub-Judge, Ranchi, D/- 7th September 1942.

Specific Relief Act (1877), S. 42—Granting of mere declaratory relief is discretionary—Suit for mere declaration held was not maintainable under circumstances of case.

A tenure consisting of several villages was granted by A, the proprietor of the estate, to the ancestor of B as jagir. B executed a usufructuary mortgage of four of the villages in favour of C in order to avoid a sale in execution of rent decree obtained by A against him and subsequently sold them to C. Subsequently A brought a rent suit against B in respect of the whole tenure alleging for the first time that the tenure was a private ghatwali tenure and not a permanent and transferable one and therefore B was liable to ejectment under S. 59, Chota Nagpur Tenancy Act. C who was in possession of the four villages thereupon instituted a suit against A and B for declaration that the tenure was a permanent, heritable and transferable one for making his position clear in law. The trial Court dismissed the suit on the merits on the ground that the tenure was only a Zamindari Ghatwali tenure and not a permanent transferable one. On appeal:

Held that the relief sought being merely declaratory, the grant of the same was discretionary

with the Court and could not be claimed as a matter of right. As A, the landlord had done nothing in relation to the portion of the tenure in C's possession to indicate that he was seeking to eject him, the suit for mere declaration was not maintainable. The trial Court in refusing to grant a mere declaratory relief after going into the merits of the plaintiff's case had exercised an erroneous discretion. 14 Beng. L. R. 382 (P. C.) *Rel on.*

[P 471 C 1, 2]

Mahabir Prasad, J.G. Sinha, R. K. Sahay, S. N. Sinha and Shambhu Prasad.—for Appellants.

P. R. Das, B. C. De, A. K. Chatterji and L. K. Choudhary.—for Respondents.

Sinha J.— This is a plaintiffs' appeal from the decision of the learned Subordinate Judge of Ranchi dismissing the plaintiff's suit for a mere declaration that the properties mentioned in Sch. B of the plaint are permanent, transferable and heritable jagir of the plaintiffs.

[2] The defendant No. 1 is the Maharaja of Chota Nagpur and the proprietor of the estate in which the property in question is admittedly situate. The plaintiffs alleged that there was tenure known as 'Tisia Salaiya lot' consisting of 14 villages which were granted to the remote ancestor of the defendants Nos. 2 to 13 sometime in 17th Century A. D., to one Prahlad Rai, who was the predecessor in title of the defendants second party (defendants Nos. 2 to 13). A genealogical table contained in Sch. C to the plaint was attached to the plaint as showing the relationship of the defendants second party to the said Prahlad Rai. The plaintiffs further alleged that the defendants second party and their ancestors had been dealing with the tenure in question aforesaid as their permanent, heritable and partible jagir, and that the proprietors of the estate had been recognising that right all along; and that the cadastral survey recorded the tenure as jagir of the defendants without any qualification. Shortly before the revisional survey, the defendant No. 1 brought a rent suit against the defendants second party, and put the entire tenure to sale, and one Hari Bux Marwari purchased the tenure on 24th February 1933. In order to deposit the decretal sum as also compensation to the auction purchaser, the tenure holders aforesaid borrowed Rs. 5800 from the plaintiffs giving in usufructuary mortgage the four villages contained in Sch. B to the plaint, and put them in possession of the same. On the deposit being thus made the sale was set aside. Subsequently, the plaintiffs purchased the right, title and interest of mortgagors in the villages aforesaid contained in Sch. B to

the plaintiff subject to the mortgage in their favour. The plaintiffs therefore are now in possession of the properties as auction-purchasers. During the revisional survey the tenure was wrongly entered, so the plaintiffs alleged, as ghatwali tenure, and after publication of the revisional record of rights the defendant No. 1 instituted a rent suit against the second party defendants being Rent Suit No. 1176 of 1936-37 alleging for the first time that the tenure was a private ghatwali tenure and not a permanent and transferable one, and that, therefore, the defendants second party were liable to ejectment under S. 59, Chota Nagpur Tenancy Act. The plaintiffs, therefore, instituted a suit for making their position clear in law by having a declaration that the tenure was a permanent, heritable and transferable one.

[3] The defence of the defendant No 1 in substance was that the tenure in question was a ghatwali jagir granted to Chama Sahi, the ancestor of defendant No. 2 as a service tenure on condition of his maintaining a certain staff for the protection of the neighbourhood subject to the right of the proprietor to dismiss the tenure-holder for neglect of duties. It was further alleged by the defendant No. 1 that the tenure was neither permanent nor heritable nor transferable nor partible, and had never been treated as such by the proprietors of the estate. It was further contended that the entries in the revisional survey record of rights are not inconsistent with those in the cadastral survey. The defendants also denied that the plaintiffs had acquired any title by virtue of their alleged purchase of portion of the ghatwali tenures.

[4] Hence the most important issues between the parties were (1) whether the "Tisia Salaiya lot" was a permanent, heritable, transferable and partible putraputradik jagir as alleged by the plaintiffs, or a zamindari ghatwali tenure as alleged by the defendants; (2) have the plaintiffs acquired any title to any portion of the said tenure by their auction-purchase aforesaid? The learned subordinate Judge after going into the evidence, both oral and documentary, adduced by the parties, came to the conclusion that the tenure in question was the zamindari ghatwali tenure, and not a permanent or transferable tenure. In that view of the matter, the Court below dismissed the plaintiffs' suit with costs to the defendant No 1. Hence, this appeal by the plaintiffs. In his case, as already observed, the relief sought is a mere declaratory one, and the grant of a declaratory relief is discretionary with the

Court, and cannot be claimed as a matter of right by the plaintiffs. In this case, the admitted proprietor the defendant No. 1 did not do anything in relation to the portion of the tenure purchased by the plaintiffs to indicate that the Maharaja was seeking to eject them. The Court below has gone into the merits of the claim of the plaintiffs, and decided against them. But in our opinion, the suit can be disposed of on the preliminary ground that a suit for a mere declaration like the present does not lie, and if it did lie, the judgment passed by the learned Subordinate Judge refusing to grant the declarations sought can be said to be an erroneous exercise of discretion. It also appears that the parties did not adduce all the evidence that was available bearing on the question in controversy between the parties. Hence, in our opinion, it is not necessary to go into the merits of the plaintiffs' claim. It is enough to hold that the discretion exercised by the Court below in refusing to grant mere declaratory relief can be said to be an unjudicial exercise of discretion. If and when the plaintiffs are sought to be ejected by the contesting defendants, or are actually dispossessed, occasion may arise for them to institute a suit for a declaration of their title, and for confirmation or for recovery of possession, and if such a suit is brought the Court will have once again to go into the question as to the exact nature of the tenure in question. The parties will then be in a position to adduce all the relevant evidence, and the Court will then be in a better position to decide on the merits of the respective claim of the parties. Hence, without going into the merits of the case of the parties this appeal is dismissed on the preliminary ground that a suit for a mere declaration cannot be entertained. See in this connection the decision of their Lordships of the Judicial Committee in 2 I. A. 83.¹

[5] As a result of these considerations the appeal is dismissed with costs.

Manohar Lal J. — I agree.

K.S./D.H. *Appeal dismissed.*

I. (74) 14 Beng. L.R. 382 : 2 I. A. 83 : 3 Sar. 447 (P.C.), *Rajah Nilmony Singh v. Kally Churn Bhat-tacharjee*.

A. I. R. (33) 1946 Patna 472 [C. N. 158]
SHEARER J.

Chandrabali Kalar — Appellant v. Baidyanath Banerjee and another — Respondents.

Appeal No. 15 of 1944, Decided on 5th September 1945, from appellate order of Sub-Judge, Sambalpur, D/- 7th-15th December 1943.

Limitation Act (1908), Art. 182 (5) — Step-in-aid—Objection to attachment by judgment—

debtor upheld — Filing of appeal by Decree-holder is not step-in-aid.

In execution of a decree the judgment-debtor's objection that the property was not liable to attachment was rejected but was upheld on appeal by the judgment-debtor. Instead of proceeding against other property of the judgment-debtor the decree-holder filed a second appeal from the order which was ultimately dismissed on 24-3-1941. In consequence his application for execution was dismissed for default in prosecution on 9-2-1940. The decree-holder thereupon filed a fresh execution application on 18-2-1943 :

Held, that the mere filing of the appeal by the decree-holder was not by itself a step-in-aid of execution and therefore the application was barred by limitation. Even if it be assumed that the filing of the appeal was a step-in-aid it could not possibly be said that any step-in-aid of execution was taken by the decree-holder when the appeal was dismissed: 26 All. 608 and 5 Cal. 595 *Relon*; (28) 15 A.I.R. 1928 Pat. 612 and (25) 12 A.I.R. 1925 Pat. 459 *Ref.* [P 472 C 2]

Lim. Act—

(42) Chitaley, Art. 182, N. 105, Pt. (1).

R. K. Das—for Appellant.

H. Sen—for Respondents.

Judgment.—This second appeal arises out of an order made in execution of a decree. The decree in question was passed in 1934, and from time to time was put into execution. When in 1939 certain property of the judgment-debtor was attached, an objection was taken that the property was not liable to attachment under certain provisions contained in the Central Provinces Tenancy Act. This objection was rejected by the learned munsif on 27th September 1939. An appeal was preferred against his order, and on 29th January 1940, this appeal succeeded. The decree-holder, instead of proceeding against other property belonging to the judgment-debtor, preferred a second appeal to the High Court. In consequence, his application for execution was dismissed for default in prosecution on 9th February 1940. The second appeal which he preferred to the High Court was dismissed on 24th March 1941. The present application for execution was made on 18th February 1943, and was, therefore, made beyond the period of limitation, if limitation is to be computed from 9th February 1940. It is, however, contended that limitation is to be computed from 24th March 1941, when the second appeal was dismissed. This contention has been accepted by both the Courts below. The Courts below relied mainly on the decision of Kulwant Sahay and Macpherson, JJ. in A. I. R. 1928 Pat. 612¹. In that case, certain property was attached and pur-

chased by the decree-holder. Subsequently an application was made by the judgment-debtor to have the sale set aside. The entire decretal amount had not been realised ; and instead of proceeding against other property of the judgment-debtor for the balance, the decree-holder waited until the application to have the sale set aside had been dismissed. It was held that certain steps taken by the decree-holder to resist the application to have the sale set aside were steps-in-aid of execution and availed to save limitation. The decision can, I think myself, be supported on the ground that the proceeding instituted by the judgment-debtor to have the sale set aside was ancillary to, and indeed, part and parcel of the proceeding in execution of the decree. The decision is, it is clear, not directly in point here. Mr. Sen, for the respondent, however, referred to an earlier decision to which Kulwant Sahay J., was also a party and which was cited in A. I. R. 1928 Pat. 612.¹ In that decision, A. I. R. 1925 Pat. 459², their Lordships, at the conclusion of their judgment, which was a short one, said somewhat compendiously :

[2] "There can hardly be any doubt that the decree-holders are entitled to regard any step taken by them to remove the obstacle thrown by the judgment-debtor in their way to the realisation of their decree as a step-in-aid of execution."

[3] Mr. Sen says, with a certain amount of justification, that the language there used is wide enough to cover the action of his client in preferring a second appeal. Their Lordships, however, did not have this specific case in mind, and there is ample authority for the proposition that the mere preferring of an appeal is not by itself a step-in-aid of execution. In this connection I may refer to 26 All. 608³ and 5 Cal. 595.⁴ Moreover, even if it can be argued that when the respondent preferred a second appeal to the High Court he in effect took a step-in-aid of execution, it cannot possibly be said that any step-in-aid of execution was taken on 24th March 1941, when the High Court made an order dismissing the appeal. In my judgment the application for execution of this decree was barred by limitation. That being so, the order of the Courts below will be set aside and the appeal will be allowed with costs.

V.S./D.H.

Appeal allowed.

2. (25) 12 A.I.R. 1925 Pat. 459 : 4 Pat 202 : 88

I. C. 807, Sheo Sahay v. Jamuna Prasad Singh.

3. (04) Adm. Cas. 608, Nand Kishore v. Sipahi Singh.

4. (80) 5 Cal. 595, Kristo Coomar Nag v. Mahabhat Khammu & Kashmir

1. (28) 15 A.I.R. 1928 Pat. 612 : 7 Pat. 708 : 113
I.C. 582, Jagdeo Narain Singh v. Bhubaneswari Kuer.

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